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No. 1049

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

STATE OF TEXAS,
Petitioner,
vs.
ALBERTO BALLI, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND SUPPORTING BRIEF.

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April 3, 1946.

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SUPREME COURT OF THE UNITED STATES

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No. 1049

STATE OF TEXAS,
Petitioner,
vs.
ALBERTO BALLI, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

To the Honorable the Supreme Court of the United States:

Short Statement of the Case

This is an action on three counts by the State of Texas to recover on behalf of its Public Free School Fund the title and possession of Padre Island, or, in the alternative, an undivided interest in it. The suit was filed by petitioner against the King Ranch and the Estate of Robert J. Kleberg, dec'd, Sun Oil Company, Sinclair Prairie Oil Company, Gilbert Kerlin, the Estate of Pat F. Dunn, dec'd, and about 200 other defendants. Padre Island, the largest island in Texas, is 110 miles long, consisting of 135,213 acres (over 30½ leagues) of land. It lies along the southeast coast of Texas between the Nueces River, which empties into Nueces Bay at Corpus Christi, Texas, and the Rio Grande, which empties into the Gulf of Mexico, near Brownsville, Texas.

The island was formerly within the jurisdiction of the State of Tamaulipas, Mexico, and from 1836, the date of the Texas Revolution, to 1845, when Texas entered the Union, it was part of the Republic of Texas. The island is a sandbar consisting chiefly of sand dunes, flats, salty bays, beaches and approximately 11½ leagues of pasture land which lies next to and parallel with the Gulf or Eastern shore. The west side of the island, which is separated from the mainland by the Laguna Madre, is very flat and barren (R. 122). The island varies in width from a few hundred varas to several miles. There are very few evidences of life on the island. The camps for cattle hands and shacks and other small houses built there have been periodically washed out and swept away by the tropical hurricanes which originate in the Carribean Sea and cross the Gulf of Mexico into Texas. Like the rest of Texas, which was once free range, it has been used through the years by various persons for pasturing horses and cattle. Unlike the rest of Texas, it was not affected by the advent of barbed wire, because the island itself was a natural enclosure. Up until recent years the island was considered as waste land and practically worthless, except for the purposes of pasturage. In 1876, when the people of Texas adopted their present constitution and set aside "one half of the public domain of the state—for a perpetual public school fund"[1] (Sec. 2, Art. VII) and released "to the owner or owners of the soil all mines or minerals that may be on same" (Sec. 7, Art.

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[1] All of the remaining public domain has since been "set apart and dedicated to the permanent school fund." Article 5421c-3 Vernon's Ann. Tex. Civil Statutes.

XIV) no one thought that Padre Island had any mineral value. It was known, of course, that Nicolas Grisante and José Maria Tovar had in 1851 applied to a Commission, created by the Legislature of Texas to examine Mexican and Spanish titles to land between the Nueces River and the Rio Grande, for 11½ leagues of pasture land on Padre Island which they claimed under the State of Tamaulipas, Mexico, as successors in title to Nicolas Balli and Juan José Balli. It was known, of course, that the Legislature of Texas had in 1852 on the basis of the report of this Commission confirmed to "Nicolas Balli and Juan José Balli, eleven and a half leagues called 'Padre Island'." This claim, however, was never surveyed and no field notes or plats of it were ever filed in the General Land Office of Texas as required by Section 8 of Article XIV of the Texas Constitution of 1876. It was known, of course, that certain persons had paid State and county taxes on scattered portions of the island from time to time based on its valuation as pasture land but those payments were sporadic and the portions of the island on which the taxes were paid were never surveyed or located on the ground. It was not until recent years, when oil and gas was discovered on the mainland, that the island was considered as mineral bearing land. No wells have been drilled on the island itself, due to the unsettled condition of the title, but there is an oil and gas field near Corpus Christi, Texas, across the Laguna Madre from its northern end and several fields have been discovered along the coast from Corpus Christi, Texas, to Brownsville, Texas. The various claimants to the island have never made any effort to establish a title against the State of Texas until the present suit, except for the validation Act of 1852 which confirmed title to 11½ leagues, although the Legislature of Texas passed laws in 1860 (Act of February 11, 1860, 4 Gammel's Laws of Texas, 1471-1473), in 1870 (Act of August 15, 1870, 6 Gammel's Laws of Texas, 375-378) and in 1901 (Act of September 3, 1901, Gen. Laws, 1st C. S., 27th Legislature, page 4) which authorized them to bring suit against the State for this purpose.

The case was tried before the District Court of Nueces County, Texas, without a jury, and judgment was entered on March 30, 1942, denying all relief to the State. Hector Crandall and Kernel Hughes, et al., whose respective applications for a mineral lease on Padre Island from the State had been denied by the Commissioner of the General Land Office of Texas, were parties to the suit. Their prayers for relief were likewise denied. This judgment was appealed to the Court of Civil Appeals at San Antonio, Texas, and that Court on June 23rd, 1943, entered its judgment affirming the judgment of the trial court (R. 255). The opinion of the Court of Civil Appeals is reported in 173 S. W. (2d) 522-544. On November 3, 1943, the Supreme Court of Texas granted a writ of error and on December 20, 1944, judgment was entered (R. 386) affirming the judgment of the Court of Civil Appeals, with one justice dissenting. A motion for rehearing, with several supporting briefs, was filed by petitioner and on November 7, 1945, the Court overruled the motion for rehearing (R. 392) with dissenting opinions by the three regularly elected justices. On September 21, 1945, six new members had been sworn in as justices of the Supreme Court of Texas, pursuant to a constitutional amendment, which was adopted August 27, 1945. The six justices who overruled the motion for rehearing had been non-voting commissioners at the time the original opinion was handed down on December 20, 1944. The majority and minority opinion are reported in 144 Tex. , 190 S. W. (2d) 71, 101. An order staying the issuance of the mandate has been entered by the Chief Justice of the Supreme Court of Texas pending disposition of this case by this Court (R. 393). The time for filing the application for certiorari was extended to the 3rd day of April, 1946, by order of this Court entered the 15th day of January, 1946.

Basis of Jurisdiction

This Court has jurisdiction under Section 2, Article III of the Federal Constitution and Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344, b) because,

1. The title of the State of Texas to Padre Island claimed under the first and second sections of a joint resolution of Congress of March 1, 1845 (5 Stat. at L. 797), being part of the Annexation Agreement between the United States and the Republic of Texas, is denied. Sections 1 and 2 of the joint resolution read as follows:

> "1. Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, that Congress doth consent, that the territory, properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.
>
> "2. And be it further resolved,—*That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees,* towit: First, said State to be formed, subject to the adjustment by this government, of all questions of boundary that may arise with other governments; and the Constitution thereof with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day

> of January, one thousand eight hundred and forty-six. *Second, said State when admitted into the Union,* after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms, and armaments, and all other property and means pertaining to the public defense belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes and dues of every kind, which may belong to or be due and owing to the said Republic; *and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct;* but in no event are said debts and liabilities to become a charge upon the government of the United States." Paschal's Dig., Laws of Texas, p. 44.

This proposal was accepted by the Republic of Texas by joint resolution of its Congress of June 23, 1845 (2 Gammel's Laws of Texas, 1225-1227, Paschal's Dig. Laws of Texas p. 45, Sayles' Early Laws of Texas, Art. 1531) and by the people of the Republic by their deputies in a convention assembled for the purpose by an ordinance of July 4, 1845 (1 Gammel's Laws of Texas 1228-1230, Paschal's Dig. p. 45). The United States confirmed the agreement and admitted Texas into the Union on an equal footing with the original states in all respects, by a joint resolution of Congress of December 29, 1845. 9 Stat. at L. 108, Paschal's Dig., Laws of Texas, p. 46. The State of Texas asserted its ownership and control over said lands by joint resolution of its Legislature of April 29, 1846. 2 Gammel's Laws of Texas, 1461, Paschal's Dig., Laws of Texas, Art. 441.[2]

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[2] The several joint resolutions forming the Annexation Agreement are all copied in full in the Appendix.

2. The judgment of the Supreme Court of Texas has misconstrued and misapplied the Treaty of Guadalupe-Hidalgo between the United States and Mexico, which was concluded on the 2nd day of February, 1848, by holding that it is applicable to the land in suit. The portion of the Treaty involved here reads as follows:

> "Article VIII
>
> "*Mexicans now established in territories previously* belonging to Mexico[3] and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.
>
> "Those who shall prefer to remain *in the said territories* may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain *in the said territories* after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.
>
> "*In the said territories,* that property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States." 9 Stat. at L., 929, 930.

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[3] **Land in Texas in 1848 previously belonged to the Republic of Texas, and was not "territories previously belonging to Mexico."**

3. The Supreme Court of Texas has held invalid under Federal Law a statute of the State of Texas of August 15, 1870 (6 Gammel's Laws of Texas, 375, 378), which, under the undisputed facts in this case, would bar the respondents from asserting any right or title to Padre Island. The material portions of this Statute read as follows:

> "Section 1. Be it enacted by the Legislature of the State of Texas, that any person who may be the original grantee, heir, or legal assignee of any grant of land emanating from the Spanish or Mexican governments, and having its origin previous to the nineteenth day of December, A. D. 1836, and situated between the Nueces and Rio Grande rivers, and below a line drawn from the northern boundary of Webb County to the mouth of the Moros Creek, emptying into the Nueces river, may file a petition to the District Court of the county of Travis, or where the capitol of the State may be; which petition shall be filed at least ten days before the time of holding of said District Court, and shall contain a full description of the land claimed, setting forth particularly its situation, boundaries and extent, and shall accompany such petition with the titles or evidences of titles or right under which the same is held or claimed; and the said District Court shall investigate the same in accordance with the laws of nations, the laws, usages and customs of the government from which the claim is derived, and the principles of equity, so far as the same are applicable, and shall give judgment for the confirmation of the same when the title is perfect; and when imperfect, when the same would have been matured into a perfect title under the laws, usages and customs of the government under which it originated, had its sovereignty over the same not been passed to and been vested in the Republic of Texas; provided, said title or right was originally founded in good faith; and provided, that no service of such petition shall be necessary."
>
> **"Section 11. Be it further enacted, That all claimants under the act of February 10, 1852, and un-**

> der the act of February 11, 1860 and all claimants to grants which may be confirmed by the courts under this act, shall have their land surveyed and the field notes returned to the General Land Office by the first day of January, A. D. 1875, or their claims shall be forever barred and such lands shall become part of the public domain of the State.[4]

5. The Supreme Court of Texas has held invalid under Federal Law Section 8, Article 14 of the Texas Constitution, which, under the undisputed facts of this case, would bar the respondents from asserting any right or title to Padre Island. This section of the Texas Constitution, which has not been amended since it was adopted in 1876, reads as follows:

> "Sec. VIII. Persons residing between the Nueces River and the Rio Grande, and owning grants for lands which emanated from the government of Spain, or that of Mexico which grants have been recognized and validated by the State by Acts of the Legislature, approved *February 10th 1852, August 15th 1870* and other acts, and who have been prevented from complying with the *requirements of said acts* by the unsettled condition of the country, *shall be allowed until the first day of January 1880, to complete their surveys, and the plats thereof, and to return their field notes to the General Land Office; and all claimants failing to do so shall be forever barred;* provided, nothing in this Section shall be so construed as to validate any titles not already valid, or to interfere with the rights of third persons."

---

[4] The predecessors in title of respondents were "claimants under the act of February 10, 1852" but they did not comply with this statute or with section 8, Article 14 of the Texas Constitution.

Questions Presented

The following Federal questions are presented in this case:

I

Texas claims the title to 19 leagues (83,132 acres) on Padre Island as the successor to the Republic of Texas, which acquired title in 1836 from the Mexican State of Tamaulipas by virtue of the Texas Revolution. Texas entered the Union in 1845 under an Annexation Agreement between the United States and The Republic of Texas, to which Texas as a state and the people of Texas became parties. The respondents claim title to Padre Island by virtue of proceedings which Nicolas Balli and Juan José Balli, their predecessors in title, had with the State of Tamaulipas, Mexico, in 1827-30, and by virtue of an act of the Texas Legislature in 1852 which confirmed upon application by Nicolas Grisante and José Maria Tovar, also their predecessors in title, the title to 11½ leagues in Cameron County, Texas, called "Padre Island".[5] The petitioner admits the confirmation act of 1852 but contends that (1) the original title issued by the State of Tamaulipas in 1827-30 was void because it was not approved by the Chief Executive of Mexico as was required of all grants to lands lying within ten leagues of the coast. The respondents, therefore, have title only to 11½ leagues on the Island, the title to which was confirmed by the Texas Act of 1852; (2) Padre Island has since 1827-30 contained over 30 leagues of land and the National Colonization Law of Mexico of August 18, 1824, which governed the proceedings in 1827-30, limited the amount of land which could be granted to a single individual to six leagues. The grant to the Ballis, therefore, could not have been for more than twelve leagues; (3) the title papers from the State of Tamaulipas, Mexico, to the Ballis describe the land which the Ballis applied to purchase, which was surveyed for them and which was paid for by them, as 11.15 leagues of pasture land and not an entire island. This corresponds with the 11½ leagues of pasture land called "Padre Island," the title to which was confirmed by the Texas Legislature in 1852. The petitioner claims title to the balance of the Island, consisting of approximately 19 leagues (83,132 acres) of flats, sand dunes and salty bays.

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[5] **The portion of the Confirmation Act of 1852 applicable here is copied in the Appendix, pp. 94, 95.**

A. It is necessary for this Court to ascertain the quantity of land, if any, which was conveyed to the Ballis by the State of Tamaulipas, as evidenced by the several instruments included in the Instructive Dispatch, a complete copy of which is in the record (R. 131-177), in order to determine whether the Annexation Agreement applies to any part of Padre Island. Three members of the Supreme Court of Texas, who alone constituted the Court until it was enlarged by Constitutional amendment adopted on August 25, 1945, say that *only* 11.15 leagues on Padre Island were granted to the Ballis by the Mexican government. Six members of the Court, who were non-voting Commissioners appointed by the Court and not members of the Supreme Court at the time the original opinion was handed down, hold that the instruments in the Instructive Dispatch had the effect under Mexican Law of conveying to the Ballis the whole of Padre Island, consisting of over 30½ leagues (135,213 acres). If the dissenting opinions are correct, Texas is being deprived of 83,132 acres of land to which she is entitled under guarantees by the United States as expressed in the Annexation Agreement.

B. The question also arises as to the construction and application of the provisions of Mexican law which prohibited the sale of land within ten leagues of the coast, without the previous approbation of the Chief Executive of Mexico. Under this contention the "grant" would be void when issued regardless of the area called for, but it was later validated to the extent of 11½ leagues by the Texas Act of February 10, 1852. These provisions were:

(1) Article 4, Decree 72, of the National Colonization Law of Mexico of August 18, 1824 (1 Gammel's Laws of Texas, 39; Sayles' Early Laws of Texas, Art. 40) which provided,

> "There cannot be colonized any lands, comprehended within twenty leagues of the limits of any foreign nation, *nor within ten leagues of the coast,* without the previous approbation of the general supreme executive power."

(2) Article II of Colonization Law of Tamaulipas of December 15, 1826 (1 Gammel's Law of Texas, 455, Sayes' Early Laws of Texas, Art. 89) which provided,

> "Art. II. In the same manner he shall take care that no town projected by foreigners be situated within ten leagues upon the coast of the Gulf of Mexico within the limits of the State, without previously obtaining the consent and approbation of the Supreme Executive of the Union. Beyond said line he shall also take care that, so far as the sites permit, the new towns be established in contact with the present ones, and with the conditions he stipulates with the empresarios."

C. The question also arises as to the construction and application of the laws of Mexico limiting the quantity of land which could be held by one individual. These provisions were,

(1) Art. 12, Decree No. 72, of the National Colonization Law of Mexico of August 18, 1824 (1 Gammel's Laws of

Texas, 98; Sayles' Early Laws of Texas, Art. 40) which provided,

> "Art. 12. It shall not be permitted to unite in the same hands with the rights of property, more than one league square of land, suitable for irrigation, four square leagues in superficies, of arable land without the facilities of irrigation, and *six square leagues in superficies of grazing land.*"

(2) Article 25 of the Colonization Law of Tamaulipas of December 15, 1826 (1 Gammel's Laws of Texas, 458; Sayles' Early Laws of Texas, Art. 89) which provided:

> "Art. 25. The Chief Executive shall convoke those born in the republic for the occupation of vacant lands, who shall be preferred to foreigners in the order of the older date of the designations, and, in case of equality, the natives or inhabitants of the place to which the land designated belongs, shall have the first place, those of places within the state the second, and those of the other states of this republic the third, *and adjudication may be made up to the amount of one hundred and twenty-five million square varas.*"[6]

II

It is necessary for this Court to ascertain whether the Sovereign was entitled to accretions on the seashore under the Laws of Tamaulipas, Mexico, in order to determine whether the Annexation Agreement applies to this part of Padre Island. The majority opinion correctly holds "that the rights of the State and respondents must be determined in the light of the civil law in effect at the time of the grant as it existed in the State of Tamaulipas." (R. 349) If, under the Spanish Civil law, which was in force in Tamaulipas in 1827-30, the accretions on the seashore belonged to the Sovereign, as stated by Mr. Justice

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[6] Five leagues.

Sharp in his dissenting opinion (R. 371), the accretions which have formed on Padre Island are "vacant and unappropriated lands" and belong to Texas under the Annexation Agreement. This is true, regardless of whether the so-called "grant" from the State of Tamaulipas to Nicolas Balli and Juan José Balli included the whole of Padre Island or only 11.15 leagues of land on Padre Island.

III

The Supreme Court of Texas has misconstrued and misapplied the Treaty of Guadalupe-Hidalgo by holding that it is applicable to Padre Island. This Court in *Elisha Basse* v. *City of Brownsville, Texas,* 154 U. S. 610, 22 L. Ed. 420, dismissed an application for a writ of error to the Supreme Court of Texas on the ground that:

> "In McKinney vs. Saviego, 18 How. 240 (59 U. S. A. V 367), it was decided that the Treaty of Guadalupe-Hidalgo had no relation to property included within the State of Texas."

IV

The Supreme Court of Texas misconstrued and misapplied the Treaty of Guadalupe-Hidalgo (1848), paragraph 2 of Article 6 of the Federal Constitution and the Fourteenth Amendment to the Federal Constitution by holding, in effect, that under their provisions, section 11 of the Texas Act of August 11, 1870 (copied pp. 8, 9 above) was invalid. The majority opinion (R. 317) mentions this statute in connection with the Act of February 10, 1852, and Section 8 of Article 14 of the Texas Constitution and strikes the three down with one fell swoop. The majority opinion did not try to "construe" this Act as it did the others, apparently because the meaning is too obvious, and it did not hold this Act invalid under the Texas Constitution. The only grounds of invalidity relied on by the Court are Federal grounds, and we must presume that the Court refused to apply and give effect to the statute for that reason only. This Statute was invoked and relied on by petitioner in exceptions to the admission of evidence in the trial court (R. 72) and in the Court of Civil Appeals (R. 268).

V

The Supreme Court of Texas misconstrued and misapplied the Treaty of Guadalupe-Hidalgo, paragraph 2 of Article 6 of the Federal Constitution, and the Fourteenth Amendment to the Federal Constitution by holding that under their provisions Section 8 of Article 14 of the Texas Constitution (copied p. 9 above) cannot be enforced if its language is read in the sense in which it would ordinarily be understood and that it must be given a narrow and strained "construction" for that reason.

VI

The Supreme Court of Texas misconstrued and misapplied the Treaty of Guadalupe-Hidalgo, paragraph 2 of Article 6 of the Federal Constitution and the Fourteenth Amendment to the Federal Constitution by holding that Texas, by reason of these provisions, lacked the power to require by reasonable regulation, upon condition of forfeiture, that the claimants to Mexican or Spanish grants between the Nueces River and the Rio Grande, whose claims had been validated, complete their surveys and identify their lands within four years in order that the extent of public domain might be accurately ascertained.

Reasons for Granting the Writ

This is the first time this Court has been called upon to construe and apply the Annexation Agreement between the United States, the Republic of Texas, the State of Texas and the people of Texas. The State of Texas long ago discharged its obligations under this compact by ceding to the United States "all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms and armaments, and all other property and means pertaining to the public defense belonging to the said Republic of Texas" and by "payment of the debts and liabilities of said Republic of Texas." This is the first time that the State of Texas, as the successor to the Republic of Texas, has applied to this court for help in retaining the public domain which the United States guaranteed to it under the terms of said Annexation Agreement.

This is the first time that the Supreme Court of Texas has held that Texas was not entitled under Mexican grants to accretions on the seashore. This ruling is of tremendous importance to Texas since most of its 380 mile coast is held under Civil Law grants which were issued before the Common law was adopted in 1840. This holding is not in accord with the holding of this court in *Ker & Co.* v. *Couden,* 223 U. S. 268.

The holding of the Supreme Court of Texas that the previous approbation of the chief executive of Mexico was not necessary under Mexican Law to the validity of grants within ten leagues of the coast is not in accord with the holding of this court in *Christy* v. *Pridgeon,* 71 U. S. 204.

The erroneous construction of the Balli grant in the majority opinion of the Supreme Court of Texas has the effect of including more land in the grant than was originally intended by the Mexican government and presents a federal question of substance by reason of the guarantees which the United States gave to the State of Texas in the Annexation Agreement. This holding is not in accord with the holding of this Court in *Ely's Admr.* v. *United States,* 171 U. S. 220.

The Supreme Court of Texas has decided a federal question of substance by holding that the State of Texas was without power, under the Treaty of Guadalupe-Hidalgo and the Federal Constitution, to provide for a forfeiture of Mexican grants lying between the Nueces River and the Rio Grande where the claimants failed and refused, after their claims had been validated, to have their lands surveyed and to file their plats and field notes in the General Land Office of Texas. This holding is not in accord with the holding of this court in *Barker* v. *Harvey,* 181 U. S. 481.

The holding of the Supreme Court of Texas that the respondents were protected under the Treaty of Guadalupe-Hidalgo in their claims to Padre Island is in conflict with the holding of this court in *Elisha Basse* v. *City of Brownsville, Texas,* 154 U. S. 610, 22 L. Ed. 420. The United States District Court for the Southern District of Texas has recently held in *Amaya et al.* v. *Stanolind Oil & Gas Co.,* 62 F. Supp. 181, that the Treaty of Guadalupe-Hidalgo is not applicable to land between the Nueces River and the Rio Grande, which land was in the former State of Tamaulipas, or to any land in the present State of Texas, on the basis of the holding of this Court in the *Basse* case. As this question of whether or not the Federal treaty is applicable is of tremendous importance, particularly to the large ranchers in Texas, whose titles, in many instances, are dependent solely on Mexican grants, the conflict between the holdings of the State courts and Federal courts on this point should be settled.[7]

Wherefore, petitioner prays for a writ of certiorari to the Supreme Court of Texas, directing it to certify to this Court for review and determination the record and proceedings in Cause No. 8187, styled The State of Texas, et al., Petitioners, vs. Alberto Balli, et al., Respondents, on the docket of that Court and upon hearing that the judgment below be reversed and judgment be here rendered in favor of petitioner and against respondents for title and possession of Padre Island, or in the alternative, for all of the Island in excess of 11½ leagues, or in the alternative for an undivided interest in Padre Island equal to the percentage which the excess over 11½ leagues bears to the total acres of the Island, and in any event for the accretions on Padre Island, or in the alternative, that the judgment below be reversed and the cause remanded, and petitioner prays for its costs.

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[7] As historical background for this point, as well as others, we have copied in the Appendix Article 88 of Sayles' *Early Laws of Texas.*

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1049

STATE OF TEXAS,
Petitioner,
vs.
ALBERTO BALLI, ET AL.,
Respondents

BRIEF IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of Texas is reported in 144 Tex. , 190 S. W. (2d) 71. The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, sitting at San Antonio, is reported in 173 S. W. (2) 522.

Grounds of Jurisdiction

This Court has jurisdiction under Section 2 of Article III of the Federal Constitution and Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 344 b) because a judgment has been rendered against the State of Texas by the highest Court in Texas in which a decision could be had and:

1. In denying the claim of Texas to accretions on Padre Island, the Supreme Court of Texas has denied a title

claimed by the State of Texas under the Annexation Agreement between the United States and the Republic of Texas.

2. In denying the claim of Texas to 19 leagues of land on Padre Island, the Supreme Court of Texas has denied a title claimed by the State of Texas under the Annexation Agreement between the United States and the Republic of Texas.

3. In upholding the claims of respondents to Padre Island on the basis of the guarantees to Mexican citizens as contained in the Treaty of Guadalupe-Hidalgo, the Supreme Court of Texas has misconstrued and misapplied the Treaty.

4. In refusing to give effect to the Texas Act of August 15, 1870, and Section 8, Article 14 of the Texas Constitution, the Supreme Court of Texas has drawn in question the validity of these Texas laws as being repugnant to the Treaty of Guadalupe-Hidalgo and paragraph 2, Article 6 of the Federal Constitution (assuming that the Treaty is applicable to land in Texas) and the Fourteenth Amendment to the Federal Constitution.

Statement of the Case

The suit was filed by petitioner in the District Court of Nueces County, Texas, at Corpus Christi on the 9th day of February, 1940, against approximately 200 defendants for the recovery of title and possession of Padre Island. The amended petition alleged a cause of action in trespass to try title and in the alternative for a forfeiture and in the alternative for a recovery of an undivided interest in the island (R. 6). The respondents all answered by pleas of not guilty and some of them specially pleaded their titles and asserted their occupation, use and payment of taxes (R. 40). The trial court entered an order permitting petitioners Kernel Hughes, et al., who were vacancy applicants, to intervene as plaintiffs (R. 54). The State sued Hector Crandall by a supplemental petition and he answered with a cross-action (R. 2). The separate applications of Kernel Hughes, et al., and Hector Crandall for a mineral lease on Padre Island from the State had previously been denied by the Commissioner of the General Land Office of the State of Texas.

The case was tried before the Court without a jury and judgment was rendered on March 30, 1942, against the State and the intervening plaintiffs. No findings of facts or conclusions of law were filed by the trial court. The case was appealed by the State and the intervening plaintiffs to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, sitting at San Antonio, and that Court on June 23, 1943, rendered judgment affirming the judgment of the trial court (R. 255). A writ of error was granted by the Supreme Court of Texas to the State and to each of the intervening plaintiffs on November 3, 1943 (R. 293). The case was submitted on briefs and oral argument on January 12, 1944, and the Supreme Court of Texas on December 20, 1944, rendered its judgment affirming the judgment of the Court of Civil Appeals (R. 386). Separate motions for rehearing by petitioner and the intervening plaintiffs, who are also petitioners here, were overruled on November 7, 1945, with a dissenting opinion by three justices (R. 392). The time for filing the applications for writs of certiorari was extended to the 3rd day of April, 1946, by order of this Court entered the 15th day of January, 1946.

The following facts are established by the record:

1. Padre Island has, and in historic times has always had, well-defined natural boundaries; the Gulf of Mexico on the East, the Laguna Madre on the West, Corpus Christi Pass

on the North and the Pass of Brazos Santiago on the South. It is described in the State's Third Amended Original Petition, on which the case was tried, and in the judgment of the trial court, as containing 135,213 acres of land. It appears from the record, without controversy and by overwhelming proof, that its only value when the proceedings were had with the State of Tamaulipas in 1829 and, for the most part, since, has been as pasture or grazing land; and that in 1829 its value as pasture land lay in the fact that it was naturally enclosed. It also appears, without controversy, from the reports of the inspectors, and of the appraisers, appointed by the Tamaulipas authorities in 1828 and 1829, and the testimony of witnesses in this suit, and more especially that of J. Stuart Boyles, the State's surveyor and principal witness, and of Burton Dunn of Respondents, who has known the island all his life, that the portion of the island which is valuable for pasturage in 1829 and now lies next to and parallel with the Gulf or Eastern shore of the island, and is a relatively narrow area which approximates de la Fuente's survey on the island in 1828. If de la Fuente's survey is laid on the present map of the island it will cover the area shown in red on plaintiff's Exhibit 336, which is sent up as an original exhibit (R. 112,394).

The lands of this island were estimated by the Padre Nicolas Balli, in December, 1827, as comprising nineteen and one-half sitios, or square leagues (R. 132). The measurements of Domingo de la Fuente, the official surveyor designated by the Governor of Tamaulipas, according to his survey made in February, 1828, includes an area of only 11.15 sitios, or square leagues (R. 158). The Commissioners who examined the Balli claim in 1851 reported to the Legislature of Texas that "we feel confident that the island called Padre Island contained or embraces over thirty leagues of land" (R. 203). As surveyed by Boyles in 1941, the area of the island is somewhat more than thirty leagues (R. 34). The excess in acreage surveyed by Boyles in 1941, as compared with that shown by de la Fuente's "Plan Demonstrativo", of 1828, consists of bare white sand, unfit for grazing or other surface use (R. 122).

2. By an Act of the Legislature of Texas, approved February 8, 1850 (Vol. 3, Gammel's Laws of Texas, p. 582) provision was made for the appointment of Commissioners to investigate Spanish and Mexican land titles in the area between the Nueces River and the Rio Grande. Commissioners Wm. H. Bourland and J. B. Miller were appointed under the provisions of this Act and made a report to the Governor of Texas—accompanied by an abstract of the proceedings had and recommendations made by the Commissioners. This abstract with regard to Padre Island (file No. 37), Cameron County, said:

> "*Nicolas Grisanti and Jose Maria Tobar apply for 11½ leagues of pasture land called 'Padre Island'* originally granted by the Spanish Government to one Nicolas Balli and subsequently confirmed to him and his nephew Juan Jose Balli by the Mexican authorities. Witnesses proved the occupation of said tract of land by said original grantee and his nephew for the last fifty years; and that they kept thereon the requisite number of stock to entitle them to the grant of 11½ leagues, never having any adverse claimants. They having obtained a title from the proper authorities and resided upon the land peaceably for a number of years, *we recommend for confirmation 11½ leagues only to the heirs or assigns of original grantee, for we feel confident that the island called Padre Island contained or embraces over thirty leagues of land. It is therefore to be understood that we recommend only 11½ leagues of said island. For testimony in this case see File No. 37 Cameron County*" (R. 202, 203).

The Final Report of the Commissioners, with accompanying title papers and other evidence, was submitted to the Governor as the Act of 1850 required, and was by him transmitted to the Legislature for its action on each individual claim. This Report and its supporting evidence was referred by the Legislature to an unusually able Select Committee of the House and Senate, which re-examined each claim on its own merits, and drew a bill which provided for unqualified confirmation of each of the grants as recommended by Miller and Bourland (R. 203).

3. The respondents deraign title by, through and under Nicolas Grisante and José Maria Tovar (R. 422).

4. Pursuant to this report, the Legislature of Texas adopted the bill thus recommended as an Act approved February 10, 1852 (Ex. 8D; Gammel's Laws of Texas, Vol. III, p. 941; Paschal's Digest of the Laws of Texas, Vol. 1, p. 734, Article 4461; S. of F. p. j) entitled "An Act to Relinquish the Right of the State to Certain Lands Therein Named" (R. 413). The part of the Act confirming the Balli claim reads:

> "Section 1. Be it enacted by the Legislature of the State of Texas, that the State of Texas hereby relinquishes all her right and interest in the following described lands to the original grantees thereof, their heirs and legal assigns, towit:
>
> County of Cameron
>
> "(12) Nicolas Balli and Juan Jose Balli, eleven and a half leagues called 'Padre Island' ".

5. It was proven that no Spanish on Mexican title pertaining to Padre Island has ever been filed in the General Land Office except the abstract of the Bourland and Miller Report; that no plat nor field notes of Padre Island was

filed in the General Land Office on or before January 1, 1880; that no field notes or plat of Padre Island has ever been filed in the General Land Office of Texas pursuant to the Act of February 10, 1852, the Act of August 15, 1870, or Section 8 of Article 14 of the Texas Constitution of 1876. (R. 81, 82).

Specification of Errors

1. The Supreme Court of Texas erred in holding that under the rule of the Spanish Civil Law which prevailed in the State of Tamaulipas, Mexico, in 1827-30, the accretions to Padre Island belonged to the owner of the upland estate and not to the sovereign.

2. The Supreme Court of Texas erred in holding that Article 4, Decree 72 of the National Colonization Law of Mexico of August 18, 1824 had no application to a grant of land by the State of Tamaulipas, Mexico, in 1827-30.

3. The Supreme Court of Texas erred in holding that Nicolas Balli and Juan José Balli received in 1827-30 from the State of Tamaulipas, Mexico, a grant to more than 11.15 leagues of land on Padre Island.

4. The Supreme Court of Texas erred in holding that the claims of respondents to Padre Island were protected by the Treaty of Guadalupe-Hidalgo.

5. The Supreme Court of Texas erred in holding that the Texas Act of August 15, 1870 was repugnant to the Treaty of Guadalupe-Hidalgo and Paragraph 2, Article 6 of the Federal Constitution and the Fourteenth Amendment to the Federal Constitution.

6. The Supreme Court of Texas erred in holding that Texas was impotent, by reason of the Treaty of Guadalupe-Hidalgo and paragraph 2 of Article 6 of the Federal Con-

stitution and the Fourteenth Amendment to the Federal Constitution, to forfeit land where claimants to Spanish or Mexican grants between the Nueces River and the Rio Grande, whose claims had been validated, failed to complete their surveys and the plats thereof and return their field notes to the General Land Office of Texas by January 1, 1880, in compliance with Section 8, Article 14 of the Texas Constitution of 1876.

Summary of Argument

The Supreme Court of Texas correctly held that the rights of the State and the respondents to Padre Island must be determined by the law in effect in Tamaulipas, Mexico in 1827-30. The right to accretions to the island since that date must be determined by the rule of the Spanish Civil Law, which was the law of Tamaulipas at that time. The determination of the quantity of land to which the Ballis were entitled by reason of their negotiations with the State of Tamaulipas is to be determined by the instruments contained in the *expediente*, or instructive dispatch, and the applicable provisions of the colonization laws of the State of Tamaulipas and the Federal Government of Mexico. These are normally matters of local law and the decisions of the Texas Courts would be conclusive if it were not for the guarantees contained in the Annexation Agreement between the United States and the Republic of Texas.[8]

The Annexation Agreement provides that the United States guarantees to the State of Texas "all the vacant and unappropriated lands" then lying within the limits of the Republic of Texas. Padre Island was then (March 1, 1845) within the limits of the Republic of Texas and petitioner claims that the whole island, or in the alternative,

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[8] The Annexation Agreement is copied in the Appendix, p. 86 to 94.

19 leagues of the island, was "vacant and unappropriated lands" of the Republic of Texas and, in any event, the accretions to the island since 1829 were "vacant and unappropriated lands lying within its limits."

Under the Mexican law and the instruments in the *expediente* and the Confirmation Act of February 10, 1852, the respondents, as the successors in title to the Ballis, are entitled to 11½ leagues of land on Padre Island unless their title has been forfeited. They are entitled to 11½ leagues instead of 11.15 leagues because the Legislature of Texas on February 10, 1852, on application of Nicolas Grisante and José Maria Tovar, who were the successors to the Ballis and the predecessors in title of respondents, confirmed the Balli claim to 11½ leagues on Padre Island. Respondents are also entitled to only 11½ leagues because the original "grant" was void, since it was issued without the previous approbation of the Chief Executive of Mexico and the Validation Act of February 10, 1852 gives respondents the only title they have. Furthermore, under the Mexican law as it existed at the time the parties negotiated for the purchase of the land, Balli and his nephew could purchase only twelve leagues of land.

The State as a succeeding sovereign is entitled to all accretions to Padre Island since 1827-30, regardless of whether the Balli claim included the whole or only 11½ leagues of Padre Island.

The judgment of the Supreme Court of Texas, which is the highest Court of the State in which a decision could be had, raises Federal questions because the claim of Texas to accretions to Padre Island and to all the land on the island over and above 11½ leagues has its foundation in the Annexation Agreement between the United States and the Republic of Texas. This Court will examine the facts in order to determine for itself whether or not a Federal question is involved and whether or not the evidence adequately sustains the findings of the majority opinion. If the dissenting opinion of Mr. Justice Sharp on the question of accretions (R. 371) is correct, the State has been deprived of the accretions to the island since 1829 to which it is entitled under guarantees of the United States, as contained in the Annexation Agreement. If the dissenting opinion of the three justices as to the proper construction of the instruments in the *expediente* and the interpretation of the provisions of Mexican law applicable thereto (R. 354) is correct, the State has been deprived of 83,132 acres (19 leagues) on Padre Island to which it is entitled under guarantees of the United States, as contained in the Annexation Agreement.

The majority of the Supreme Court of Texas fell into error in their determination of the outside boundaries of the original Mexican survey in this case by failing to differentiate between a survey bounded by a river and a survey on the upland facing the seashore. In Mexican surveys bordering a river the lines of the survey extend to the water's edge. If the called distances are too short to reach the river the survey will, nevertheless, be extended to the river, if it is called for, because the river is in every respect a natural monument. But this is not true of surveys on the coast. Under the Mexican civil law, which was in force in the State of Tamaulipas in 1827-30, the surveys for private individuals could extend no further than the line of highest tide. The tide lands between this line and the water's edge were reserved to the government and were not subject to private appropriation or ownership. The Gulf of Mexico and the Laguna Madre, which are affected by the ebb and flow of the tide, are not now and were not then natural monuments comparable to a river. Although de la Fuente, the Mexican surveyor, did not call for the east-west lines of his survey to extend to the

Laguna Madre on the west, the courts below have nevertheless extended these lines (in some instances several miles) in order to reach the Laguna Madre shore line. The lines of the original survey should be extended no further than their called distances east and west, and if they are laid down in this manner the survey will include only the 11.15 leagues of pasture land on Padre Island which in 1829 and now lies next to and parallel with the Gulf or Eastern shore of the island, and is a relatively narrow area which approximates de la Fuente's survey of the island in 1828.

The Annexation Agreement is the foundation of the State's right to all vacant and unappropriated lands in the State. If land has ever been titled or patented by the State or any prior sovereign, it ceases to be vacant and unappropriated land. It is not necessary under Texas practice for the State to specially plead its title in a suit for recovery of land. The mere act of bringing suit for a described tract and the exhibit of its petition in Court makes out a prima facie case of ownership for the State.

The respondents in this case did not offer in evidence any final grant or patent from any sovereign and, therefore, the burden rested upon them to disprove the Federal right rather than upon the State to prove it. In exercising its powers of review over decisions of State Courts this Court will follow the State practice, even as to the manner of raising a Federal question.

The Federal guarantees of the State's claim are presumed to have been relied on in this case by the petitioner without express allegation, because of the character of the suit. The courts take judicial notice of the historical facts on which the State bases its claim to all vacant and unappropriated land in Texas and of the laws of prior sovereigns. This Court will review those laws and the undisputed facts as shown by the *expediente* of proceedings between the Ballis and the State of Tamaulipas and other record evidence in order to determine whether or not petitioners' rights under the Annexation Agreement have been impaired.

The decision of the majority opinion on the question of accretions is contrary to the decision of this Court in the case of *Ker and Co.* v. *Couden,* 223 U. S. 268. The decision of the majority opinion as to its interpretation of the Mexican laws limiting the quantity of land granted to one individual and its construction of the instruments in the *expediente* are contrary to the holding of this Court in the case of *Ely's Admr.* v. *U. S.,* 171 U. S. 220.

The Treaty of Guadalupe-Hidalgo has no relation to property included within the State of Texas, because on February 2, 1848, when the Treaty was adopted, land in the State of Texas had previously belonged to the Republic of Texas and did not come within the phrase "territories previously belonging to Mexico" as used in the Treaty.[9]

Although the majority opinion of the Supreme Court of Texas attempts to avoid an outright decision on the validity of Section 8, Article 14, of the Texas Constitution by giving it a spurious construction, the non-Federal ground is not adequate and the effect of the Court's decision is to deny to the State of Texas the power of requiring by reasonable regulation upon condition of forfeiture that the claimants to Mexican or Spanish grants between the Nueces River and the Rio Grande, whose claims had been validated, complete their surveys and identify their lands in order that they might be segregated from the public lands owned by the State. The Supreme Court of Texas and the Court of Civil Appeals each stated in their respective opinions that Texas does not have the power to forfeit a grant which was good in 1876, when the Constitution was adopted, for failure to comply with the provisions of Section 8, Article 14, requiring the survey of Mexican and Spanish grants and the filing of field notes in the General Land Office of Texas. They hold that the claims of respondents are protected under the Treaty of Guadalupe-Hidalgo, paragraph 2 of Article 6 of the Federal Constitution, and the Fourteenth Amendment to the Federal Constitution. Their erroneous view on this Constitutional question is responsible for their strained and unreal construction of Section 8, Article 14, wherein they say that the words "forever barred" as used in that section mean that the claimants of Mexican or Spanish grants are only barred from obtaining patents to their lands from the State of Texas but are not barred from asserting their Mexican titles in the Courts of Texas. The Act of August 15, 1870 is, of course, not subject to this false interpretation because it contains the same provisions as Section 8 of Article 14 of the Constitution except that after the words "forever barred" it contains the provision that "such lands shall become part of the public domain of the State." The Act of August 15, 1870, is expressly referred to in Section 8 of Article 14 of the Texas Constitution. It is also referred to in the opinion of the Supreme Court of Texas and it was called to the attention of that Court and to each of the lower courts during the trial of this case. The failure of the Supreme Court of Texas to make an express holding with reference to the validity of the Act of August 15, 1870, under the Federal Constitution and the Treaty of Guadalupe-Hidalgo is further evidence of that Court's attempt to evade all Federal questions, and it is further evidence that the decision of the Supreme Court of Texas is not in fact based on non-Federal grounds. The Texas Act of August 15, 1870, and Section 8, Article 14 of the Texas Constitution are valid under the decisions of this Court in *Barker* v. *Harvey,* 181 U. S. 481; *Mitchell* v.

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[9] **Article VIII of the Treaty of Guadalupe-Hidalgo is copied in Appendix, p. 95.**

Furman, 180 U. S. 402; and *Bottiller* v. *Dominquez,* 130 U. S. 238, even if the Treaty of Guadalupe-Hidalgo should be held to be applicable to land in Texas between the Nueces River and the Rio Grande.

Argument

1. THE ATTORNEY GENERAL OF TEXAS HAS AUTHORITY TO APPLY FOR A WRIT OF CERTIORARI ON BEHALF OF THE STATE.

The Attorney General of Texas is a constitutional officer and his powers are prescribed by Section 22, Article 4 of the Constitution of Texas. Article 5420, Texas Vernon's Annotated Civil Statutes, reads in part as follows:

> "When any public lands are held, occupied or claimed by any person, association or corporation adversely to the State, or to any fund, or when lands are forfeited to the State for any cause, the Attorney General shall institute suit therefor, together for rent thereon, and for any damages thereto."

The authority of the Attorney General of Texas, under the above statute, to represent the State of Texas in all suits for the recovery of public lands is settled. *State* v. *Delesdenier,* 7 Texas 76; *Day Land & Cattle Co.* v. *State,* 68 Tex. 526, 4 S. W. 865; *Weatherly* v. *Jackson,* 123 Tex. 213, 71 S. W. (2d) 259; *Humble Oil & Refining Co.* v. *State, Tex. Civ. App.,* 162 S. W. (2d) 119, error refused; *Franks* v. *Krohn, Tex. Civ. App.,* 164 S. W. (2d) 529, error refused; *United States* v. *Texas,* 143 U. S. 621; *United States* v. *Texas,* 162 U. S. 1; *Oklahoma* v. *Texas,* 252 U. S. 372. The Attorney General of Texas is authorized to represent the State in the Supreme Court of the United States on an application for Writ of Certiorari to the Supreme Court of Texas. *Florida* v. *Mellon,* 273 U. S. 12; *Boynton* v. *Hutchinson Gas Co.,* 292 U. S. 601.

2. THE PORTION OF PADRE ISLAND COVERED BY THE ORIGINAL MEXICAN SURVEY.

It is the contention of petitioner that the original survey in 1828 by the Mexican surveyor Domingo de la Fuente covered only that part of Padre Island which was fit for the purpose for which Nicholas and Juan Jose Balli desired to use it; namely, cattle grazing. In other words, the only land on the island that Nicholas Balli and his nephew desired to purchase and the only land that was surveyed and the only land that they paid for was the 11.15 leagues of pasture land which in 1829 and now lies next to and parallel with the Gulf or Eastern shore of the island (R. 122).

The record does not disclose the amount of the accretion that has been added to the island since 1828. The Court of Civil Appeals and the Supreme Court of Texas discussed the civil law rule with reference to ownership of accretions on the seashore but made no fact findings with reference to the amount of accretions, if any. Both courts, however, assumed as a basis for their respective judgments that the island contained much more area in 1828 than the 11.15 leagues surveyed by de la Fuente. In this connection the Court of Civil Appeals said:

> "Assertion that Grant is Limited to 11½ Leagues.
>
> "We first discuss the question from the standpoint of an assumption that there was in fact a substantial excess over 11.15 leagues in the island about the year 1829.
>
> "As between the two assumptions, on the basis of the evidence, there is little to choose. The probability is that there was an excess and that there also were accretions. The writer is rather inclined to credit the Bourland and Miller estimate, especially in view of the fact that *the de la Fuente survey was apparently made for the purpose of estimating the amount of pasture land in the island,* for which the State of Tamaulipas

> should be paid, rather than for the purpose of outlining the boundaries of the island which was entirely surrounded by water. *De la Fuente did not attempt to survey the Laguna Madre shore line.* He completed his survey in eight days. Boyles in 1941 took three months. This rather indicates that the survey was an estimate upon which the amount of the purchase price could be determined, and was so accepted by the Tamaulipas authorities at Victoria." 173 S. W. (2d) p. 539. (R. 242).

The dissenting opinion of the three justices of the Supreme Court of Texas says:

> "From the reports made at the time of the survey by de la Fuente the length of Padre Island and the acreage embraced therein were undoubtedly about the same as when commissioners Bourland and Miller made their report in 1851." (R. 359). 190 S. W. (2d) p. 104.

The majority opinion of the Supreme Court of Texas says:

> "The land had been denounced by the Ballis as 19½ sitios. This could have been based upon an earlier survey by the Spanish authorities. Because of the fact that the surveyor of Tamaulipas measured the land as containing 11.15 sitios, the inference must be drawn that the authorities of Tamaulipas survey was on a different basis and that the authorities of Tamaulipas were interested in the number of leagues of pasture land the island contained. * * *
>
> "The visual inspection had judicially determined that the island contained no land suitable for cultivation and no wood land. Its only value was for pasturage. The only need, therefore, for the survey and for the visual inspection was to ascertain the amount in dues the grantees were required by law to pay. This was measured not by the number of leagues in the entire area of the island, but under the plain terms of the

statute by the number of leagues of pasture land it contained." (R. 345, 346). 190 S. W. (2) 97.

The "plain terms of the statute" which the court has reference to are the provisions of Article 23 of the Colonization Law of the State of Tamaulipas (1 Gammel's Laws of Texas, 457; Paschal's Digest of the Laws of Texas, p. 230; Vol. 1, Sayles' Early Laws of Texas, p. 135) which provides:

> "Art. 23. The new settlers shall pay to the State as an acknowledgment thirty dollars for each sitio of grazing land, uncultivated, or woodland, that is adjudicated to them; and for those having the benefit of running water an estimate shall be made by two competent persons, chosen by the executive and the settler, setting out from the established rule."

It is perfectly obvious that the "estimate" which "two competent persons" shall make is of the price per sitio to be paid for the land and not the amount or location of the land. The latter was determined, as in this case, by the survey made by the official surveyor and the price of the land where there was running water was fixed, as in this case, by two competent persons. The "two competent persons" who fixed the price of the 11.15 leagues the Ballis had applied to buy were Manuel de la Garza, who was appointed by the Government, and Antonio Maria Casas, who represented the interested parties, and they fixed the price of the land at $40 per sitio (R. 167, 168). The Ballis paid only $446.00 to the State of Tamaulipas for the land on Padre Island (R. 170) and this was on the basis of 11.15 leagues (11.15 × $40 = $446.00). The price of public land was fixed by law at a certain price per sitio, and the officers of the Mexican State of Tamaulipas had no authority to sell it for less. The fact that at the time some land was considered as worthless was good reason for the purchaser to insist that it not be included in his survey but it was not sufficient to enlarge the powers of Mexican officials so that they in their discretion would be authorized to give it away. *State* v. *DeLeon,* 64 Tex. 553. *United States* v. *Hartnell's Heirs,* 22 How. 286. *Ely's Admr.* v. *United States,* 171 U. S. 220.

The opinions of the Court of Civil Appeals and the majority opinion of the Supreme Court of Texas approach the case as though the petitioner was suing only to recover the excess acreage within the outside boundaries of the original survey. An alternative count in the State's petition is based on this theory (R. 38) but the primary contention below and the contention here is that the de la Fuente survey did not extend to the Laguna Madre shoreline and did not include anything but the pasture land, which then and now lies next to and parallel with the Gulf or Eastern shore of the island. This is the basic distinction between the majority and minority opinions of the Supreme Court of Texas. The majority of that Court says:

> "The official surveyor for the State of Tamaulipas ran a line approximately from north to south along the Gulf shore of the island and at right angles and at intervals usually of 10,000 varas cross lines to the shore of the Laguna Madre * * *.
>
> "Regardless of the details of the survey or possible errors in calculations, the record exhibits, in our opinion, a clear intent on the part of the officials of the State of Tamaulipas to cede the entire island" (R. 345, 346) 190 S. W. (2d) p. 97.

The dissenting opinion of the three justices says:

> "De la Fuente attached to his field notes and report a map showing in detail the manner and method pursued by him in making such survey, as well as the distances and prominent points used to make such survey. It is worthy of notice that the map made by de la Fuente embracing the land claimed by the Ballis

> does not show the shore lines of Laguna Madre, and in making the calls contained in his field notes he projected from the shore line on the Gulf side and he mentions the border of the Laguna only one time" (R. 358) 190 S. W. (2) p. 103.
>
> "It is quite plain that when we consider the character of the land at the time the claim was filed and the application made therefor, and the reports made thereon, the only land the Ballis were interested in or desired to pay for was the land suitable for pasturage. They were not interested in the sand dunes and salty bays, as they were unfit at that time for any purpose and were of no value; and it is quite obvious from his report that de la Fuente did not include them in his survey. There is no evidence in this record tending to show that the Mexican authorities intended to grant the entire Padre Island to the Ballis, because the survey showed only 11.15 leagues and the payment received was for only that amount of land. The survey and the Treasurer's receipt describe it as 11.15 leagues, and the judge in certifying to the juridical possession of this land stated that he placed the purchasers in possession of the 'eleven sitios for large cattle and six caballerias' " (R. 360, 361) 190 S. W. (2) 104.

Chief Justice Alexander in this separate dissenting opinion says:

> "While de la Fuente's field notes definitely call for the east or Gulf side of the island as the east boundary of the land to be granted to Balli and his nephew, there is only one call for the west or Laguna side of the island, and that is at the north end of the island where it is very narrow. The survey was made by beginning at the north end of the island and going south along the east side thereof and measuring—by stretching a cord—from east to west part of the way across the island at intervals of approximately five miles each. The length of these measurements from east to west were given. The amount of the land included in the survey was ascertained by assuming an imaginary line

> from north to south connecting the extreme west ends of the cords stretched across the island. Many of the measurements from east to west did not extend halfway across the island according to the present dimensions of the island. When Miller and Bourland inspected the island in 1852 they found that it contained more than thirty leagues of land. In fact, at the time Balli and his nephew were negotiating for the purchase of the land in 1828 they admitted that the island contained over nineteen leagues. The survey made by de la Fuente for the land to be set aside to Balli and his nephew contained only 11.15 leagues. It is apparent, therefore, that the survey made by de la Fuente included only a narrow strip of land along the east side of the island. The footsteps of the surveyor can be folowed an dthe land located" (R. 383, 384) 190 S. W. (2d) 115, 116.

The area included in de la Fuente's survey according to his own field notes (R. 158) amounts to exactly 11.15 sitios or leagues. The majority of the Supreme Court of Texas fell into error by assuming that the Laguna Madre was a natural monument, and extending the east-west lines of the survey to it. The field notes, report, and map of de la Fuente not only do not call for Laguna Madre but also under the Mexican law as it then existed, the Mexican surveyor was prohibited from extending his survey to the Laguna Madre. In surveys that fronted on rivers it is true that under the Mexican law, the river was a natural monument and the survey extended to the water's edge. *City of Austin* v. *Hall,* 93 Tex. 591, 57 S. W. 563; *Stover* v. *Gilbert,* Tex. Com. App., 247 S. W. 841; *Maury* v. *Robinson,* 122 Tex. 213, 56 S. W. (2d) 438; *Maufrais* v. *State,* 142 Tex. 559, 180 S. W. (2) 144. Where the body of water, as here, was affected by the ebb and flow of the tide, the civil law rule was that the tidelands were reserved by the government and the survey extended no further than the line of the highest tide. *Galveston City Surf Bathing Co.* v. *Heidenheimer,* 63 Tex. 559; *Roseborough* v. *Picton,* Tex. Civ. App., 34 S. W. 791; *Hynes* v. *Packard,* 92 Tex. 44; *Dincans* v. *Keeran, Tex. Civ. App.,* 192 S. W. 603; *Curry* v. *Port Lavaca Channel & Dock Co.,* Tex. Civ. App., 25 S. W. (2d) 987; *Borax Consolidated* v. *City of Los Angeles,* 296 U. S. 10, 15, 22. There is nothing in the field notes, report and map of de la Fuente or in any of the instruments included in the *expediente* to indicate that the Ballis applied to buy or that the State of Tamaulipas intended to sell the thousands of acres of flats, sand dunes and salty bays that in 1828 and now lie between the pasture land on Padre Island and the Laguna Madre shoreline. De la Fuente's survey did not call on the west for "the water's edge". *Cf. United States* v. *O'Donnell,* 303 U. S. 501; *Stewart* v. *United States,* 316 U. S. 354.

The policy of the Mexican law was to sell land "by the acre" and to limit the amount which could be sold to one individual. *State* v. *Sais,* 60 Tex. 87; *State* v. *DeLeon,* 64 Tex. 553; *United States* v. *Hartnell's Heirs,* 22 How. (63 U. S.) 286; *United States* v. *Pico,* 5 Wall. (72 U. S.) 536; *Ainsa* v. *United States,* 161 U. S. 208; *Ely's Adm'r* v. *United States,* 171 U. S. 220; *Camou* v. *United States,* 171 U. S. 277; *United States* v. *Maish,* 171 U. S. 242; *Ainsa* v. *United States,* 184 U. S. 639; *Reloj Cattle Co.* v. *United States,* 184 U. S. 624; *United States* v. *Green,* 185 U. S. 256. The statement in the majority opinion of the Supreme Court of Texas that "there was no quantitive limitation of which we are aware. The vacant domain was the King's special prerogative" (R. 331), has reference to the Spanish law. It was definitely not the law nor the policy of the law of Mexico after September 21, 1821, when Mexico gained its independence from Spain. See cases cited above.

In *Ely's Admr.* v. *United States, supra,* which involved a Mexican grant issued in 1825 and later lying in the then Territory of Arizona, this court said:

> "Sustaining the validity of the grant to the extent of the land paid for is but carrying out the spirit of the treaty, the obligations of international justice and the duties imposed by the act creating the Court of Private Land Claims. Article 8 of the Treaty of Guadalupe Hidalgo provided in reference to the ceded territory that 'Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever,' and that 'in the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected' 9 Stat. 929; and these stipulations were reaffirmed in Article 5 of the Gadsden treaty. 10 Stat. 1035. Article 6 of that treaty, which placed a limitation, provided 'that no grants of land within the territory ceded * * * will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico.' But this limitation is not to be understood as denying the obligations imposed by the rules of international law in the case of cession of territory, but simply as defining specifically the evidences of title which are to be recognized. The spirit of the treaty is fully carried out when the amount of land petitioned and paid for is secured to the grantee or his successors in interest. This Government promised to inviolably respect the property of Mexicans. That means the property as it then

> was, and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before remained so after. That which was subject to challenge before did not become a vested right after. No duty rests on this Government to recognize the validity of a grant to any area of greater extent than was recognized by the government of Mexico. If that government had a right, as we have seen in Ainsa v. United States it had to compel payment for an overplus or resell such overplus to a third party, then this Government is under no moral or legal obligations to consider such overplus as granted, but may justly and equitably treat the grant as limited to the area purchased and paid for * * *." Ely's Adm'r v. United States, 171 U. S. at page 238, 239, 240.

The laws of the Federal Government of Mexico (Art. 12, Decree 72 of the National Colonization Law of Mexico of August 18, 1824; 1 Gammel's Laws of Texas, 98; Sayles' Early Laws of Texas, Art. 40; Paschal's Digest of the Laws of Texas, p. 210) and of the State of Tamaulipas (Art. 25 of the Colonization Law of Tamaulipas of December 15, 1826; 1 Gammel's Laws of Texas, 458; Sayles' Early Laws of Texas, Art. 89; Paschal's Digest of the Laws of Texas, p. 230), which limited the amount of land which was permitted to be united in the same hands, do not conclusively determine the quantity of land purchased by the Ballis. The original survey then, as now, determined the quantity and location of the land which was severed from the public domain. *Pinkerton* v. *Ledoux*, 129 U. S. 346, *Sullivan* v. *Texas*, 207 U. S. 416. But, under the facts of the present case, it is unreasonable to presume that the State of Tamaulipas intended to violate these laws and to convey an amount of land which is nearly three times the area which was surveyed and paid for. *United States* v. *Hartnell's Heirs*, 22 How. (63 U. S.) 286. *Ely's Adm'r* v. *United*

States, 171 U. S. 220. It is also significant that in 1833, after the transaction with the Ballis, the State of Tamaulipas continued its policy of limiting the amount of land which could be granted to one individual. Section 18 of the Colonization law of Tamaulipas of November 17, 1833 (Vol. 1, Sayles' Early Laws of Texas, p. 140) provided:

> "Lands For Breeding Animals—The applications that may be made to the government for lands for breeding animals, shall be admitted; first, if he who denounces them is not the owner of large tracts of land; second, if, in the judgment of the government, he proves the necessity for the lands; and the applicant shall be obliged to occupy each sitio with at least one hundred head of cattle or horses, within the precise period of four months, counting from the date of the issuance of the title; *and, even in such cases, the government cannot concede more than six sitios to any single individual.*"

This was the second and last law relating to the colonization of vacant lands which was passed by the State of Tamaulipas prior to the Texas Revolution in 1836 and it has been construed as limiting grants to one individual to six leagues. *State* v. *DeLeon*, 64 Tex. 553.

The Ballis acquired only the surface estate in the 11.15 leagues which they purchased from the State of Tamaulipas. The Mexican Government reserved all the minerals. *Cowan* v. *Hardeman*, 26 Tex. 217, 226; *Cox* v. *Robison*, 105 Tex. 426, 150 S. W. 1149, 1156. It was not until the adoption of the Texas Constitution of 1866 that the predecessors in title of respondents could have acquired any interest in the minerals on and under Padre Island. Section 39, Article 7 of that Constitution provided:

> "Art. VII, Sec. 39 (of the Constitution of 1866). That the State of Texas hereby releases to the owner of the soil all mines and mineral substances, that may be on

> the same, subject to such uniform rate of taxation as the legislature may impose. All islands along the Gulf coast of the State, not now patented or appropriated by locations under valid land certificates, are reserved from location or appropriated (appropriation) in any other manner by private individuals than as the legislature may direct." Paschal's Digest of the Laws of Texas, Vol. 1, p. 952.

The first sentence of this provision was included in the Texas Constitution of 1869, as Article 10, Section 9 (Paschal's Digest of the Laws of Texas, Vol. 2, p. 1122) and it was included in the present Texas Constitution, which was adopted in 1876, as Section 7 of Article 14. It has been held that this provision of the constitution has the effect of releasing "only those mines and minerals in soil *owned* at the time of its adoption." *Cox* v. *Robison,* 105 Tex. 426, 150 S. W. 1149. The Ballis, of course, did not own the soil in the thousands of acres of sand dunes, flats and salty bays lying outside of de la Fuente's survey. The survey included only the 11.15 leagues of pasture land and that is all that the Ballis paid for and all the land on the island that was worth $40 a league in 1827-30. Grisante and Tovar, the successors in title to the Ballis, recognized this when they applied in 1851 to the Bourland and Miller Commission for confirmation of only 11½ leagues of pasture land and the Commissioners determined it when they recommended that the Balli claim be confirmed for only 11½ leagues of land on Padre Island (R. 202).

3. ACCRETIONS ON THE SEASHORE BELONGED TO THE SOVEREIGN UNDER THE LAW OF TAMAULIPAS IN 1827-30

It has been noted above that there was no evidence as to the amount of the accretions to Padre Island since 1827-30. Both courts below presumed that there had been some accretions and on the basis of this presumption decided the issue of ownership of accretions adversely to petitioner. It is not, of course, an abstract inquiry so far as Texas is concerned because there is 380 miles of Texas coast line, most of the upland along this coast having been disposed of to private individuals prior to 1840, when the rule of the Common Law was adopted as the rule of decision in Texas. 2 Gammel's Laws of Texas, 177, 178; Vol. 1, *Sayles' Early Laws of Texas,* Art. 707. That statute reads in part as follows:

> "Section 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress Assembled, that the common law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) shall, together with such acts be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress.
>
> "Section 2. Be it further enacted, that all laws in force in this Republic, prior to the first of September, one thousand eight hundred and thirty-six (except the Laws of the Consultation and Provisional Government, now in force, and except such laws as relate exclusively to grants and the colonization of lands in the State of Coahuila and Texas, and also such laws as relate to the reservation of Islands and lands and also of salt lakes, licks and salt springs, mines and minerals of every description; made by the General and State Governments) be, and the same are hereby repealed."

It will be noted that this statute continues in force "such laws as relate exclusively to grants and the colonization of lands in the State of Coahuila and Texas" but does not say anything about the laws of the State of Tamaulipas. The Supreme Court of Texas has held in this case, however, that the Laws of Tamaulipas in effect in 1827-30 determine the question of the ownership of accretions to Padre Island (R. 349).

The majority opinion of the Supreme Court of Texas relies principally on an opinion written by "Dr. Mariano Rubio of the Universities of Barcelona and Madrid." We are unable to enlighten this Court as to just who Dr. Rubio is or to refer the Court to any of his other writings. His opinion, which was in the possession of counsel for respondents during the trial of this case, was dated August 16, 1940. This suit was filed prior to that date, but whether his opinion was written for the purposes of this suit, we do not know. We do know, of course, the authorities relied on by Mr. Justice Sharp in his dissenting opinion (R. 373-379). In our view the decision of this Court in *Ker & Co.* v. *Couden*, 223 U. S. 268, which is followed by Mr. Justice Sharp, conclusively settles the question.

The majority opinion of the Supreme Court of Texas literally brushed aside and refused to consider *Ker & Co.* v. *Couden* as an authority on the question now under discussion with the statement that:

> "The State presses the case of Ker v. Couden, 223 U. S. 268, 56 L. ed. 432. The court in that case 'was dealing with the law as it existed in the Philippines, not with that which prevails in this country, whether of *mixed antecedents* or the common law.' (Emphasis on the words '*Mixed antecedents*' is made by the majority opinion.) (R. 353).

The above-quoted statement of the majority opinion, we submit, reveals a total lack of understanding of the import of *Ker & Co.* v. *Couden* and of the questions to be determined in this case under the assignment now being discussed.

First, notice the majority opinion's emphasis on the words "*mixed antecedents*" in the quoted statement that *Ker & Co.* v. *Couden* dealt not with the law now prevailing in the United States, "whether of *mixed antecedents* or the common law." The quotation of this sentence from *Ker & Co.* v. *Couden* and the emphasis given by the majority opinion to "mixed antecedents" indicate plainly that the majority opinion has refused to consider *Ker & Co.* v. *Couden* as an authority simply because that case did not deal with the law of accretion prevailing in this country in States whose present, *prevailing* law has as its antecedents either the common law, or "*mixed antecedents.*" Therefore, according to the plain implication by the court, since the *present,* prevailing law of Texas admittedly has *mixed antecedents* (in the case of Texas, Common law and Civil law antecedents) *Ker & Co.* v. *Couden* is not to be considered, since it was expressly *not dealing with* that character of prevailing law.

But what are we searching for, in the case at bar, as the *governing rule* as to seashore accretions? Is it the presently *prevailing* rule of Texas, whose *present* law *admittedly* has mixed *antecedents?*—or, is it the Civil law existing in Tamaulipas in 1827-30, when Respondents claimed grant was made? The majority opinion correctly holds that:

> "It is clear from the decisions of this court that the rights of the state and respondents must be determined in the light of the *Civil law in effect at the time of the grant* as it existed in the State of Tamaulipas. Miller v. Letzerich, 49 S. W. (2d) 404, and authorities cited. It cannot be doubted *that the law as incorporated in Las Siete Partidas* was in effect in the State of Tamaulipas at the date of the grant. In fact, on *September 21, 1821,* when Mexico gained its independence, the *Spanish Municipal law was in effect and so continued* until the State adopted its first Civil Code on June 29, 1871" (R. 349).
>
> See, also, Article 7392, R. S. of Texas, 1925, to the same effect.

So, plainly we are searching for the civil law of Spain (as that was the law in effect in Tamaulipas in 1827-30, and long prior thereto), and *not* for the prevailing law in Texas governing grants made by the State of Texas subsequent to its statehood. Thus, the fact that prevailing Texas law of mixed antecedents is not dealt with in *Ker & Co.* v. *Couden* does not detract from the authority of that case, as we are here searching only for the Civil Law of Spain, which admittedly has *only* Civil Law antecedents.

From the opinion of this Court in *Ker & Co.* v. *Couden,* it is apparent that the controlling law for which this Court was there searching was the *Civil Law of Spain,* which was in effect in the Philippines *in* 1811, the date on which the accretion began. There is no question but that the Civil Law of Spain in 1811 was the same as the Civil Law in force in Tamaulipas in 1827-30, in so far certainly as the right to accretion is concerned, and the identical law was in force in the Philippines on both of those dates. This Court in *Ker & Co.* v. *Couden* said:

> "The seashore flowed by the tides, unlike the banks of rivers, was public property; in Spain, belonging to the sovereign power. Inst. II, tit. 1, 3, 4, 5, D. 43, 8, 3. Partidas III, tit. 28, 3, 4. And it is a somewhat different proposition from that laid down as to rivers, if it should be held that a vested title is withdrawn by accessions to what was owned before. Perhaps a stronger argument could be based on the rule that the title to the river bed changes as the river changes its place. Part. III, 28, Law 31, Inst. 2, 2, 23, D. 41. 1. 7, 5. But we are less concerned with theory than with precedent in a matter like this, whether we agreed with Grotius or not in his general view. The Spanish commentators do not help us, as they go little beyond a naked statement one way or the other. It seems to us that the best evidence of the view prevailing in Spain is to be found in the codification which presumably embodies it. The Law of Waters of 1866, which became effective in the Philippines in September, 1871, and the validity of which we see no reason to doubt, after de-

> claring, like the Partidas, that the shores (playas), or spaces alternately covered and uncovered by the sea, are part of the national domain and for public use (Arts. 1, 3) goes on thus: 'Art. 4. The lands added to the shores by the accessions and accretions caused by the sea belong to the public domain. When they are not (longer) washed by the waters of the sea, and are not necessary for objects of public utility, nor for the establishment of special industries, nor for the coast guard service, the government shall (will?) declare them property of the adjacent estates, in increase of the same'." 223 U. S. page 277.

So that there may be no question in the Court's mind as to any change in the governing law of Tamaulipas between 1811 and 1827-30, affecting or changing in any manner the law of accretion, we have made search for any such change in the laws of Tamaulipas and of Spain from 1810 to 1827-30, in fact to 1865, and find none. And simply to remove any possible question on this score, we quote the following from a brief filed in this case in the lower court by *Respondents:*

> "Careful search has been made for any constitutional or statutory law which became effective at any time from September 27, 1821 (indeed, from 1810) to the end of the year 1829, bearing directly or indirectly upon the subject o fthe respective rights of the national government, and the grantee from the State, to additions of any kind made to a tract of land fronting on a navigable stream or other water, whether such additions existed at the time of the grant or were made subsequently, and nothing has been found."

And to remove any doubt that may exist (although as a matter of history none can exist) as to whether the Civil Law of Spain is and has been in effect in the Philippines, we quote, first, from 40 Corpus Juris, 1248:

> "Into far eastern Asia the civil law was first carried by the Portuguese * * * in the early years of the

> *sixteenth century. The Spaniards, about the same time, brought their civil law to the Philippines* where largely *it still remains.* * * * "

And to remove any doubt as to whether the Civil Law of Spain in effect in 1811 (and in 1827-30) in the Philippines had by 1811 been changed or affected by any local laws or customs of the Philippines, or whether the laws contained in the Siete Partidas had by then been changed by Statute in the Philippines, we quote from the opinion of the Supreme Court of the Philippines, per Judge Willard, in *Ker & Co.* v. *Couden,* VI Phil. Rep. 732, 737:

> "With reference to the land which was formed prior to 1871 *the law governing the same is found in the Partidas,* the provisions of that body of law being applicable under the circumstances to a case of this character."

Since the Supreme Court of Texas holds that the rights of the State of Texas are to be determined in this case by the rule of the Spanish Civil Law as expressed in the Las Siete Partidas, this Court can determine that question for itself. The erroneous conclusion of the Supreme Court of Texas is not binding on this Court as a rule of local law because the Annexation Agreement guarantees to Texas, as a proprietor, the "vacant and unappropriated lands" lying within the Republic of Texas. If the accretions to Padre Island belonged to the Republic of Texas, they likewise belong to the State of Texas. They cannot be appropriated to individuals and private corporations by an erroneous decision of the Supreme Court of Texas, any more than they could be appropriated by an Act of Congress.

4. THE FEDERAL QUESTIONS THAT WERE RAISED AND THAT ARE NECESSARILY INVOLVED

(a) The United States in the Annexation Agreement guaranteed to Texas the title and possession of that part of the land in suit which was "vacant and unappropriated lands" of the Republic of Texas. The question of whether or not any part of Padre Island was "vacant and unappropriated land" within the meaning of the Annexation Agreement is a mixed question of law and fact. It was not necessary for the State of Texas to allege its rights under the Annexation Agreement in order to raise a Federal question in this connection because, first, the filing of this suit in the statutory form of an action in trespass in try title had the effect of asserting the State's rights under the Annexation Agreement; and, second, the rule of local law with reference to the burden of proof imposed on respondents the burden of disproving the Federal right which the State is presumed to have relied on. *State* v. *Balli,* Tex. Civ. App., 173 S. W. (2d) 524; *State* v. *Jadwin,* Tex. Civ. App., 85 S. W. 490, writ of error refused; *Hamilton* v. *State,* Tex. Civ. App., 152 S. W. 1117, writ of error refused. The situation, in so far as it involves the raising of a Federal question, is the same as though the State's claim were predicated solely upon a title, right, or privilege granted by the Federal Government. *Lytle* v. *Arkansas,* 63 U. S. (22 How.) 193; *Union Pacific Railway Co.* v. *James Murphy,* 115 U. S. 1; *Packer* v. *Bird,* 137 U. S. 661; *Knight* v. *United Land Association,* 142 U. S. 161; *Central Vermont R. Co.* v. *White,* 238 U. S. 507; *St. Louis I. M. and S. Ry. Co.* v. *Starbird,* 243 U. S. 592; *Brewer-Elliott Oil and Gas Co.* v. *United States,* 260 U. S. 77, 87; *Great Northern Ry. Co.* v. *Reed,* 270 U. S. 539; *Borax Consolidated* v. *City of Los Angeles,* 296 U. S. 10, 19; *Stewart* v. *United States,* 316 U. S. 354.

The State introduced its petition in trespass to try title which described the island and claimed it as State-owned land, and after an admission that the island lay in Texas, it rested (R. 71). This was all that the State was required to do in order to make out a *prima facie* case for recovery. *State* v. *Delesdenier,* 7 Tex. 75; *Day Land and Cattle Co.* v. *State,* 68 Tex. 526, 4 S. W. 865; *State* v. *Jadwin,* Tex. Civ. App., 85 S. W. 490, writ of error refused; *Hamilton* v. *State,* Tex. Civ. App., 152 S. W. 1117, writ of error refused. In *State* v. *Delesdenier, supra,* the court said:

> "In other respects, the petition was sufficiently formal. The title of the plaintiff, to the land in controversy, her ownership and right of possession were averred. There was no necessity of describing the character of her title. Had the defendant craved oyer, her Declaration of Independence, her Constitution and laws are the deed which she would have exhibited—a deed that the defendant could not have questioned—it was written upon materials more durable than parchment, and sealed with the blood of her sons." 7 Tex. p. 96, 97.

Even though we consider that the State by exhibiting its petition, which claimed land within its borders, merely created a presumption of ownership, this initial presumption was never overcome. It is true that the Supreme Court of Texas has held that respondents have good title against the State to all of Padre Island, but this holding is not based on any formal title or grant issuing from the Mexican government or from the State or Republic of Texas. The evidence of the proceedings between the Ballis and the State of Tamaulipas in 1827-30, which were offered by respondents, did not include any single instrument which constituted, under Mexican law, a severance of the land from the public domain. The respondents had only an equitable or inchoate title, if any. In other words, the burden of going forward, as well as the burden of proof, was always on respondents and the petitioner never had the burden of attacking the validity or sufficiency of any instrument which, on its face, amounted to a transfer of any part of Padre Island, either by the Governments of Mexico, Texas, or the United States. The ultimate question, like the initial question, was whether or not the proceedings in 1827-30 were sufficient as an executory contract of sale to effect a severance of Padre Island from the Public domain of Tamaulipas, Mexico. The State Court has attempted to answer the question and we think it has, under the undisputed facts, given an erroneous answer. But, the burden of proof on the question, as well as the burden of going forward, was at all times upon respondents, who were the defendants below. It was never in order, under the local rule, for the State to affirmatively assert the source or the character of its title. The burden was upon respondents at all times to allege and prove that no part of Padre Island was "vacant and unappropriated lands" of the Republic of Texas. Only by such a showing could respondents overcome the Federal guaranty which is inherent in and forms a part of the petitioner's title. The Court of Civil Appeals in this case held:

> "The State as sovereign, by the exhibit of its petition, made out a prima facie case for the recovery of the lands described therein. State v. Delesdenier, 7 Tex. 76; Day Land and Cattle Company v. State, 68 Tex. 526, 4 S. W. 865. The burden therefore devolved upon appellees to establish that either the State of Texas, or some prior sovereign, had relinquished, ceded or granted the lands here involved to appellees' predecesors in title." 173 S. W. (2d) 522. (R. 212.)

This is a local rule which must be observed under the doctrine of *Erie Ry. Co.* v. *Tompkins,* 304 U. S. 64. *City Service Oil Co.* v. *Dunlap,* 308 U. S. 208.

The decision of the Supreme Court of Texas to the effect that the State is not entitled to the accretions to Padre Island is predicated on an erroneous conception of the Civil Law rule of accretions as it existed in 1827-30 in the State of Tamaulipas, Mexico. The decision of the Supreme Court of Texas to the effect that the original proceedings between Nicolas Balli and Juan José Balli and the State of Tamulipas, Mexico, constituted a grant of all Padre Island and not merely 11.15 leagues, involves mixed questions of law and fact. Under such circumstances this Court will review or independently determine all questions on which a Federal right is necessarily dependent. *United States* v. *Pink*, 315 U. S. 203, 217, 218. Where the existence of the alleged Federal question itself depends upon a finding of fact, this Court will examine the facts to see whether the evidence adequately sustains the findings of the State Court. *King* v. *Putnam Investment Co.*, 248 U. S. 23, *Davis* v. *Wechsler*, 263 U. S. 22, *Creswill* v. *Grande Lodge, Knights of Pythias of Georgia*, 225 U. S. 246, 261, 262, *Hoover & Allison Co.* v. *Evatt*, October Term, 1944, 89 L. ed. 852, 857. In the last case cited, this Court said:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to re-examine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. Kansas City Southern R. Co. v. Albers Commission Co., 223 U. S. 573, 591, Truax v. Corrigan, 257 U. S. 312, 325, First Nat'l Bank v. Hartford, 273 U. S. 548, 552, and cases cited; Fiske v. Kansas, 274 U. S. 380, 385, 386; Norris v. Alabama, 294 U. S. 587, 589, 590."

The majority opinion correctly holds that the rights of the parties to Padre Island are to be determined by the Mexican law in effect in 1827-30 when Nicolas Balli and Juan José Balli had their negotiations with the State of Tamaulipas, Mexico. The court said:

> "It is clear from the decisions of this Court that the rights of the State and respondents must be determined in the light of the civil law in effect at the time of the grant as it existed in the State of Tamaulipas. Miller v. Letzerich, 121 Tex. 248, 49 S. W. (2) 404, 85 A. L. R. 451, and authorities cited. It cannot be doubted that the law as incorporated in Las Siete Partidas was in effect in the State of Tamaulipas at the date of the grant. In fact, on September 21, 1821, when Mexico gained its independence, the Spanish Municipal law was in effect and so continued until the State adopted its first civil code on June 29, 1871.
>
> "The State of Tamaulipas had but one law of colonization, that is, the one of December 15, 1826, at the date of the grant in this case." 190 S. W. (2d) 94 and 99 (R. 349).

In the *Letzerich* case, the Supreme Court of Texas says:

> "It is elementary that a change of sovereignty does not affect the property rights of the inhabitants of the territory involved. Kilpatrick v. Sisneros, 23 Tex. 113, 131; Musquis v. Blake, 24 Tex. 461, 466; Airhart v. Massieu, 98 U. S. 491, 496, 25 L. ed. 213; Jones v. McMasters, 20 How. 8, 21, 15 L. ed. 805; U. S. v. Percheman, 7 Pet. 87, 8 L. Ed. 604.
>
> "After the revolution by which Mexico gained her independence, the Spanish civil law prevailed in connection with the decrees and statutes of the Supreme Government of Mexico. For four years after the successful struggle of Texas for independence, Texas retained the civil law as the rule of decision. The statutes in force in the Republic of Texas before the introduction of the common law are to be construed in the light of the Mexican civil law, and the validity

> and legal effect of contracts and of grants of land made before the adoption of the common law must be determined according to the civil law in effect at the time of the grants." 49 S. W. (2) 407, 408.

Mr. Justice Sharp in his dissenting opinion in this case says:

> "The majority opinion as I understand it, holds that the respondents are entitled to all of Padre Island, based upon the proceedings emanating from the Mexican Government and de la Fuente's survey, independent of the Act of 1852; and the case of Cavazos v. Trevino, supra, is cited in support of that holding. The conclusions of the majority must find support in the assumption that the proceedings had with the Mexican Government were sufficient to pass title to Padre Island and that de la Fuente's survey covered the entire island, and that when the Ballis bought and paid for only 11.15 leagues they acquired all of the island." 190 S. W. (2) p. 106 (R. 364).

The majority opinion in this case makes the statement that

> "Whether the State of Tamaulipas had a right to recover any excess is not necessary for us to determine. It is enough to say that whatever right remained in the State of Tamaulipas, if any, passed to the State of Texas, and that such right was expressly relinquished to the owner of the island by the Act of Confirmation of February 10, 1852. This conclusion necessarily follows from the ruling made by this court in the case of Clark v. Hills, 67 Tex. 141, 2 S. W. 356." 190 S. W. (2) 98 (R. 348).

This is not a holding, however, that the act of confirmation of February 10, 1852, had the effect of enlarging the Balli title beyond the limits of the original survey. This Court has previously construed this Confirmation Act of

February 10, 1852, in *Sullivan* v. *Texas,* 207 U. S. 416, at page 423. It was there stated:

> "Coming to the merits, it is obvious that the Act of 1852 was simply a confirmation of grants made by the Mexican states. There is nothing in it which suggests the thought of new grants or of addition to old ones. The 1st section declares that the state 'relinquishes all her right and interest in the following described lands to the original grantees thereof,' and names the amount of land included in this grant so relinquished—6½ leagues. The 2d section makes it the duty of claimant to have surveys made of their existing grants. The third section makes provision in case of the loss of the 'original title papers of lands claimed by this act,' while paragraph 5 speaks of 'the confirmation herein extended to the lands mentioned in this act.' "

The Supreme Court of Texas found first that the original "grant" from the State of Tamaulipas, Mexico, to Nicolas Balli and Juan José Balli included the whole of Padre Island, and second that the Act of February 10, 1852, confirmed the title to all of the land within the original "grant." The second holding is dependent upon the first, and a reading of the majority opinion makes plain that the majority of the Court would not hold that the Act of February 10, 1852, has the effect of vesting in respondents good title to the whole of the island, *if* the original "grant" was in fact for only 11.15 leagues. The Act of February 10, 1852, has the effect of confirming the title to all the land within the boundaries of the original grant and the boundaries of the grant are determined by the outer lines of the original survey. This construction has been uniformly applied by the Supreme Court of Texas. *State* v. *Corrigan,* (Tex.) 94 S. W. 101, *Clark* v. *Hills,* 67 Tex. 141, 2 S. W. 356.

(b) The majority opinion of the Supreme Court of Texas construed Article 4, Decree 72 of the National Colonization

Law of Mexico of August 18, 1824 (See p. 12 of the Application and 1 Gammel's Laws of Texas, 39, Sayles' Early Laws of Texas, 40) as having no application to the land in suit (R. 339). The Supreme Court of Texas held "that a grant from the State of Tamaulipas of land situated within the border leagues is valid without the previous approbation of the Supreme Executive of Mexico being first obtained" (R. 340). In *Christy* v. *Pridgeon,* 71 U. S. 204, this Court held:

> "In construing the 4th article cited from the Colonization Law of Mexico, the Supreme Court of Texas has repeatedly held that it operated as a prohibition of any grant of land within the littoral or coast leagues mentioned, without the previous assent of the Federal Executive of Mexico; that such assent was essential to the validity of a grant within those limits, and that such assent was not to be inferred from the existence of the grant but must be affirmatively established. A series of decisions to this purport, from an early history of the State down to the present time, is found in the reports of her courts. These decisions have become a rule of property in that State, any departure from which would disturb titles to extensive and densely settled districts of country. Goode v. McQueen's Heirs, 3 Tex. 241; Edwards v. Davis, 3 Tex. 321; Smith v. Power, 23 Tex. 32. We receive them, therefore, to quote the language of this court, in League v. Egery, 24 How. 266 (65 U. S. XVI, 655) 'as having a binding force almost equivalent to positive law.' "

There is no evidence in this case that the Federal Executive of Mexico ever assented to the Balli "grant."

This reversal of position by the Supreme Court of Texas in its decisions which constitute a "rule of property" is not within the doctrine of *Erie Ry. Co.* v. *Tompkins,* 304 U. S. 64. The prior decisions of the Supreme Court of Texas, especially after they were approved by this Court, entered into and became a part of the State's title as a proprietor. The State of Texas can raise, under the guarantees of the Annexation Agreement, the Federal questions which a person can raise under the Fourteenth Amendment. This ruling of the Texas Courts was challenged in the assignments of error (R. 257). By misconstruing Article 4, Decree 72 of the National Colonization Law of Mexico of August 18, 1824, the Supreme Court of Texas has deprived the State of "vacant and unappropriated lands" of the Republic of Texas, to which it is entitled under the Annexation Agreement. The validation act of February 10, 1852, which confirmed the Balli title to 11½ leagues called "Padre Island" did not affect the title to the remainder of the island. In 1851 Bourland and Miller in recommending confirmation of *only 11½* leagues estimated that Padre Island contained in excess of 30 leagues of land (R. 203).

The laws of Tamaulipas are not deemed foreign laws but they are laws of an antecedent government of which the Supreme Court of Texas and this Court will take judicial notice. *State* v. *Sais,* 47 Tex. 307, 318; *United States* v. *Pico,* 5 Wall. 536, 18 L. ed. 695.

(c) The majority opinion of the Supreme Court of Texas in this case held that the respondents were protected by Section 8 of the Treaty of Guadalupe-Hidalgo. That Court states:

> "The Legislature of Texas, at its first session after the proclamation of the treaty of Guadalupe-Hidalgo, adopted an appropriate measure to give the treaty effect.
>
> "The proviso, therefore, was intended by the Legislature to protect the grants as made pursuant to the treaty of Guadalupe-Hidalgo. * * *

> "And in the Gallardo case, 106 Tex. 274, 166 S. W. 369, 373, the court says: '* * * We do not deem it necessary to reopen the question urged by the able counsel for the State as to whether property rights within the territory, over which the sovereignty of Texas was extended, were within the protection of the treaty of Guadalupe-Hidalgo. That, in relation to such rights, that treaty has the force of law in Texas has been repeatedly affirmed by this Court. State v. Sais, 47 Tex. 307; Clark v. Hills, 67 Tex. 141, 2 S. W. 356; Haynes v. State, 100 Tex. 426, 100 S. W. 912. We furthermore regard it as established in this state, under these decisions and others and in the light of the State's legislation, that a title to lands within the original Mexican State of Tamaulipas and the present boundaries of Texas that was good as against the Mexican government on December 19, 1836, the date of the act of the Congress of the republic defining the boundaries of Texas so as to include that territory, is within the protection of the treaty and entitled to recognition in the courts' " (R. 326).

This Court in *Elisha Basse* v. *City of Brownsville, Texas*, 154 U. S. 610, which also involved a title to land emanating from the former State of Tamaulipas, Mexico, dismissed an application for writ of error to the Supreme Court of Texas on the ground that,

> "In McKinney v. Saviego, 18 How. 240 (59 U. S. X. V., 367), it was decided that the Treaty of Guadalupe-Hidalgo had no relation to property included within the State of Texas" 22 L. Ed. 420.

The United States District Court for the Southern District of Texas in *Amaya, et al.* v. *Stanolind Oil & Gas Co.*, 62 F. Supp. 181, has recently followed the holdings of this Court in *Elisha Basse* v. *City of Brownsville, supra*, and *McKinney* v. *Saviego*, 59 U. S. (18 How.) 367.

This question of title under the Treaty of Guadalupe-Hidalgo has been a primary issue throughout the case. The Court of Civil Appeals in its opinion said:

> "'Appellees' primary contention may be designated as 'Title under the Treaty of Guadalupe-Hidalgo.' Appellant's points relating thereto are:
>
> 'The Court's error in failing to hold that no grant from Spain or Mexico was ever issued to Padre Island (III).
>
> 'The Court's error in failing to hold that a grant of Padre Island was not in fact made and could not legally have been made under the Mexican laws then in force as applied to the undisputed facts here presented (IV).
>
> 'The Court's error in holding that the admittedly incomplete proceedings relied upon by (appellees) divested Mexico of either legal or equitable title (V).
>
> 'The Court's error in holding that the Treaty of Guadalupe-Hidalgo confirmed (appellees') or their predecessors' claims to Padre Island (VI).
>
> 'The Court's error in failing to hold that the facts proved refuted any possibility of the presumption of a grant (VII)' " 173 S. W. (2) 525 (R. 214).

The same assignments of error were carried forward in the Motion for Rehearing in the Court of Civil Appeals (R. 258) and in petitioner's application for writ of error to the Supreme Court of Texas (R. 290) and in its motion for rehearing to that Court (R. 388, 391).

(d) It was proven as a part of this record that neither the respondents nor their predecessors in title ever had the Balli claim surveyed nor did they ever file field notes of it in the General Land Office of Texas as required by the Act of February 10, 1852, the Act of August 15, 1870, and Section 8 of Article 14 of the Texas Constitution (R. 81).

Section 8, Article 14 of the Texas Constitution of 1876, provides:

> "Persons residing between the Nueces river and the Rio Grande, and owning grants for lands which emanated from the Government of Spain, or that of Mexico which grants have been recognized and validated by the State by acts of the Legislature, approved February 10, 1852, August 15, 1870, and other acts, and who have been prevented from complying with the requirements of said acts by the unsettled conditions of the country, shall be allowed until the first day of January, 1880 to complete their surveys, and the plats thereeof, and return their field notes to the General Land Office; and all claimants failing to do so shall be forever barred; provided nothing in this section shall be construed as to validate any titles not already valid, or to interfere with the rights of third persons."

Section 11 of the Texas Act of August 15, 1870, provided:

> "Be it further enacted, that all claimants under the act of February 10, 1852, and under the act of February 11, 1860 and all claimants to grants which may be confirmed by the courts under this act, shall have their land surveyed and the field notes returned to the General Land Office by the first day of January A. D. 1875, or their claims shall be forever barred and such lands shall become part of the public domain of the State" 6 Gammel's Laws of Texas, 378.

The relevant parts of the Texas Act of February 10, 1852, are quoted in the Appendix, pages 94, 95.

The Supreme Court of Texas in holding that the title of respondents was not forfeited under these statutes and the Constitution, said:

> "It will be noted that the quoted section of the Constitution has never been considered by any of the appellate courts of this state. Provision was made for surveys, field notes and patents in terms similar, and in

some cases identical, with those contained in Section 2 of the Act of Confirmation of 1852, in the Act of February 15, 1858, Laws 1857-58, c. 147, relinquishing the right of the State to certain lands in El Paso County. Clark v. Hills, 67 Tex. 141, 2 S. W. 356. The Act of February 11, 1860, Laws 1860, c. 78, provided for adjudication of claims for land between the Nueces and the Rio Grande and in the Act of August 15, 1870, and for the adjudication of title to lands situated between the Nueces and the Rio Grande originating prior to December 19, 1836. State v. Sarnes, 47 Tex. 323.

"Failure to make surveys and file field notes as required by the second section of the Relinquishment Act of February 10, 1852, and by Section 8 of Article 14 of the Constitution of 1876 has never been accorded the slightest importance either by the political authorities of Texas or by the courts. See State v. Corrigan, 94 S. W. 101; Schaeffer v. Berry, 62 Tex. 705; Haynes v. State, 100 Tex. 433, 100 S. W. 915. We are also of the opinion as was suggested by the Honorable Court of Civil Appeals, that to construe the quoted section of the Constitution in accordance with the contentions of the State *would necessarily raise serious constitutional questions.* This is certainly true in the light of clause 2, Article 6 of the Constitution of the United States and certain other constitutional provisions, including those prohibiting the impairment of obligations of contract, the denial to any citizen the equal protection of the laws, and the taking of private property without due process of law. Mr. Justice Bradley remarked in Gonzales v. Ross, 120 U. S. 605, 7 S. Ct. 705, 717, 30 L. Ed. 801, 809: 'A man whose title was good in 1876, when the constitution was adopted, whether his muniments of title were on record or not, could not be deprived of it by a simple ipse dixit of the constitution any more than by a legislative act.' " (R. 316, 317).

The Court of Civil Appeals had said:

"In our opinion, the adoption of the construction of Article XIV, Section 8 of the Texas Constitution which

> is here urged by the State *would raise a grave constitutional question* as to its validity in view of certain provisions of the Constitution of the United States. See Gonzales v. Ross, 120 U. S. 605, 7 S. Ct. 705, 30 L. ed. 801; Texas Mexican Ry. Co. v. Locke, 74 Tex. 370, 12 S. W. 80." 173 S. W. (2d) p. 538 (R. 241).

This Court in *Gonzales* v. *Ross* (1886) 120 U. S. 605, 630, had said:

> "It is unnecessary, at this time, to decide upon the effect of the provision contained in that Constitution prohibiting the future registration of titles, or the depositing of them in the land office. If its effect is to make titles void which were before good, *a grave constitutional question* may arise, with regard to its validity, which we would prefer not to pass upon until it has received the consideration of a local court, state or federal."

This Court, however, was talking about Section 4, of Article 13 of the Texas Constitution of 1876.[10] This section was later held invalid in *Texas Mex. Ry. Co.* v. *Locke* (1889), 74 Tex. 370, 12 S. W. 80, as being in violation of the due process clause of the Fourteenth Amendment and the contract clause of Article 1, Section 10 of the Federal Constitution. The expression, "grave constitutional question," which this Court used in *Gonzales* v. *Ross,* has been appropriated by the State Courts in this case as an excuse for not writing on the constitutionality of the state laws involved. This Court very properly declined to pass on the validity of Section 4 of Article 13 of the Texas Constitution until after the Texas courts had spoken. The Supreme Court of Texas in this case attempts to dodge its responsibility of passing on the validity of Section 8 of Article 14 of the Texas Constitution. In justification of its opinion it says, (1) "that to construe the quoted section of the Constitution (Sec. 8, Art. 14) in accordance with the contentions of the State would necessarily raise serious constitutional questions" (R. 319). (2) "It (Sec. 8, Art. 14) was perhaps placed in the constitution of 1876 for the purpose of relieving owners of grants of the specified class from the effects of Section 4 of Article 13 of the Constitution," (R. 316) and (3) "It is not an unreasonable construction, in order to avoid the consequences of a forfeiture, to construe the section (Sec. 8, Art. 14) to mean that the owners of grants within the limited territory described 'shall be forever barred' from receiving a patent from the State of Texas if the surveys, etc. are not filed with the Land Commissioner by the time specified, towit, January 1, 1880" (R. 319).

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[10] This section is copied in Appendix, p. 96.

Section 8, Article 14 of the Texas Constitution and Section 11 of the Texas Act of August 15, 1870 are copied on page 61, above. These acts deal with a class of claimants to Mexican and Spanish grants who would not necessarily be subject to the penalty prescribed in Section 4 of Article 13 of the Constitution. See Appendix, p. 96. Section 4 of Article 13 deals with the recording of the original title either in the county in which the land lay or in the General Land Office. Section 8 of Article 14 deals with the making of surveys and plats of the Mexican and Spanish grants and the filing of the same in the General Land Office after the title has been validated by the State. It says nothing about recording the original title, and section 4, Article 13 says nothing about making surveys and plats and filing them in the General Land Office. Section 8, Article 14 has reference only to claims, such as the Balli claim, which were approved by the acts of "February 10, 1852, August 15, 1870 and other acts" and it is directly related to Section 2 of Article 7 of the Texas Constitution of 1876, which appropriated to a State "perpetual public school fund—one-half of the public domain of the State." The requirement of Section 8, Article 14 of the Constitution that surveys of land between the Nueces River and the Rio Grande be made and plats be filed in the General Land Office within four years after 1876, was the only method employed for segregating the privately owned lands from the public domain. *State* v. *Sarnes,* 47 Tex. 323. The reason that Section 8, Article 14 was made applicable to the area between the Nueces River and the Rio Grande and to no other part of Texas was because this area had been a sort of no-man's-land between Texas and Mexico, and, as a consequence, the titles in that area were in a very confused condition. It was only in this area that the State set up a system for validation of Mexican and Spanish grants. See Article 88, *Sayles' Early Laws of Texas,* Appendix p. 97. It is perfectly obvious, therefore, that the second excuse which the Supreme Court of Texas gives for not making an outright determination of the validity of Section 8, Article 14 of the Texas Constitution on Federal grounds is wholly untenable. The reasoning of the second excuse (se p. 64 above) seems to be that since Section 8, Article 14 was placed in the Constitution to relieve "owners of grants of the specified class from the effects of Section 4 of Article 13 of the Constitution," the court should carry out the purpose of the framers by relieving the claimants of Mexican and Spanish grants not only of the requirements of Article 13, Section 4, but also of the requirements of Article 14, Section 8. This can hardly be classified as a non-federal ground on which the decision is based, but if so classified, the "ground" is wholly "unsubstantial and illusory." *Ward* v. *Love County,* 243 U. S. 17, 22; *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282, 283.

The other pretext for avoiding an outright decision on Federal grounds of the validity of Section 8, Article 14 of the Texas Constitution, was that the words "from receiving a patent from the State of Texas" should be added after the words "forever barred" in this section of the Constitution. It is well settled in Texas that "the meaning of the Constitution is fixed when it is adopted and it is not different at any subsequent time when a court has occasion to pass on it," *Traveler's Ins. Co.* v. *Marshall*, 124 Tex. 45, 76 S. W. (2d) 1007, 1012, 96 A. L. R. 802, and that "the words are to be interpreted as the people generally understood them." *Markowsky* v. *Newman*, 134 Tex. 440, 136 S. W. (2d) 808, per Judge Slatton. The Supreme Court of Texas has the power, of course, to violate these fundamental canons of construction and to write amendments into the Constitution of Texas; but by doing so, it cannot cut off the jurisdiction which this Court has to inquire into the matter and to determine for itself whether or not a federal question is involved. *Ward* v. *Love County*, 253 U. S. 17, 22; *Rogers* v. *Alabama*, 192 U. S. 226, 230, 231; *Brenkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; *Patterson* v. *Alabama*, 294 U. S. 600.

The Supreme Court of Texas also gave as a reason for disregarding Section 8 of Article 14 of the Texas Constitution that "it has never been accorded the slightest importance either by the political authorities of Texas or the Courts," and in support of the statement, cited *State* v. *Corrigan*, 94 S. W. 101; *Schaeffer* v. *Berry*, 62 Tex. 705, and *Haynes* v. *State*, 100 Tex. 433, 100 S. W. 915 (R. 317). The cases of *State* v. *Corrigan* and *Haynes* v. *State* hold that Mexican grants in the former State of Tamaulipas are protected by the Treaty of Guadalupe-Hidalgo. The idea that this treaty somehow exempts claimants to Mexican or Spanish grants between the Nueces River and the Rio Grande, whose titles had been confirmed, from the requirements of Section 11 of the Act of August 15, 1870, and Section 8, Article 14 of the Texas Constitution of 1876, originated with the case of *State* v. *Sais,* 47 Tex. 307, which was decided in 1877. That suit was brought under the Act of August 15, 1870, by claimants under a Tamaulipas grant. In that case the Supreme Court of Texas said:

> "A claimant may rely upon the validity of his title under the laws of this State, including the treaty of Guadalupe-Hidalgo, which is binding as a law, without availing himself of the benefits of a suit under this law."

This is a correct statement, if the Treaty of Guadalupe-Hidalgo applies to land in Texas, since Section 11 of the Act of August 15, 1870 applies only to "claimants under the act of February 10, 1852, and under the act of February 11, 1860 and all claimants to grants which may be confirmed by the courts under this act.' Page 61, *supra.* Those who did not apply to the State for a confirmation of their titles do not come within the provisions of the Act of 1870 or Section 8, Article 14 of the Texas Constitution. There has never been a decision on the validity of the forfeiture provisions of the Act of August 15, 1870 and Section 8, Article 14 of the Texas Constitution until the present case.

The other case cited as authority for the statement that the political authorities and courts of Texas have never "accorded the slightest importance" to Section 8, Article 14 of the Texas Constitution is *Schaeffer* v. *Berry,* 67 Tex. 705. That was a suit involving the Ricon del Oso ten league grant issued to Enrique Villareal on November 16, 1831, by the State of Tamaulipas, Mexico. The City of Corpus Christi, Texas, and an oil and gas field are now located on this grant. The case was cited by the Supreme Court of Texas because of the following statement which it contains:

> "There is no evidence that the owners of the Villareal title have ever complied with the requirements of a

> survey and return of field notes to the land office in the confirmation act of February 10, 1852; in the act of August 15, 1870, or with provision of the constitution of the state on the same subject."

This, of course, is a matter for the Attorney General to investigate and act upon and not for the Courts. The State was not a party to that suit.

The Supreme Court of Texas has construed Section 2 of Article 14 of the Texas Constitution of 1876 as providing for a forfeiture. That section dealt with "unsatisfied genuine land certificates" instead of Mexican or Spanish grants which had been validated. The portion of Section 2, Article 14 which is material here reads, "All unsatisfied genuine land certificates now in existence shall be surveyed and returned to the General Land Office within five years after the adoption of this Constitution, or be *forever barred.*" In *New York and Texas Land Company* v. *Thompson* (1891) 83 Tex. 169, 17 S. W. 920, the Supreme Court of Texas held that this language barred a person who owned a genuine land certificate in 1876, when the Constitution was adopted, and who failed to have it surveyed and returned to the General Land Office within five years, from thereafter asserting any rights in the land which had been located under the certificate. When confronted with this prior decision in which the same words "forever barred" in the same article of the Constitution had been construed to mean forfeiture, the Supreme Court of Texas said:

> "The case of New York & Texas Land Company v. Thompson, 83 Tex. 169, 17 S. W. 920, 923, relied upon by the State, deals with an unlocated land certificate. An unlocated land certificate is merely 'the obligation of the government entitling the owner of it to secure the designated quantity of land by following the requirements of the law'. The effect of the Relinquishment Act of 1852 was 'to recognize the validity of the

> Mexican grant and render the title perfect as against the State.' Clark v. Hills, 67 Tex. 14, 2 S. W. 356." (R. 320).

It is to be noted that the Texas Court makes no effort to distinguish between the meaning of "forever barred" as used in Section 2 of Article 14 from the words "forever barred" as used in Section 8 of Article 14 of the Texas Constitution but attempts to distinguish its prior holding solely on the basis of the character of the right which was being forfeited. This is not a sound distinction because an "unsatisfied genuine land certificate" was a valuable, vested right and the State owned the duty not to destroy or forfeit that right by *unreasonable* subsequent legislation. The distinction which the Texas Court actually had in mind was that, in its opinion, the claims to the Balli title, unlike the claims to the genuine land certificates, were protected under the Treaty of Guadalupe-Hidalgo and that Section 8, Article 14 of the Texas Constitution would be invalid if applied to this case. The Court of Civil Appeals comes right out and says so. In the footnote on page 538 of its opinion in this case (173 S. W. (2) 522) it says:

> "It seems clear that if the title to Padre Island be protected by the Treaty of Guadalupe Hidalgo (and we have held that it is) Article XIV, Section 8 of the Texas Constitution could not be given effect as attaching a condition of forfeiture to the grant, even if appellant's construction of the Texas constitutional provision be accepted. The second paragraph of Article VI of the Constitution of the United States provides that: 'This Constitution and the Laws of the United States which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' " (R. 241, 242)

There cannot be any doubt that this construction and application of the Treaty of Guadalupe-Hidalgo is also the basis of the Supreme Court's decision in this case.

In its efforts to avoid a decision on the validity of Section 8, Article 14 of the Texas Constitution, the Supreme Court of Texas invalidated Section 11 of the act of August 15, 1870. This law (se p. 61, *supra*) expressly provided not only that claimants such as respondents "shall be forever barred", but that "such lands shall become part of the public domain of the State." It is undisputed that respondents did not comply with this law (R. 81). This act of 1870 was invoked by petitioner in its objections to the itnroduction of evidence in the trial court (R. 72) and it was urged and considered throughout the case and discussed by the Supreme Court of Texas in its opinion. (R. 317, 318), see p. 62 above. Since the Supreme Court of Texas upheld respondents' title on the basis of the Treaty of Guadalupe-Hidalgo and since only federal grounds were discussed in connection with the forfeiture provided for in Section 8, Article 14 of the Constitution, it must be presumed that the Court struck down the Act of August 15, 1870 for the same reasons. The surmise that the Supreme Court of Texas *might* have held Section 11 of the Act of August 15, 1870 invalid under some provision of the Texas Constitution is not sufficient to divest this Court of jurisdiction. *Grayson v. Harris*, 267 U. S. 352, 358.

There is no evidence that respondents or their predecessors in title were "prevented from complying with the requirements of" the act of August 15, 1870 "by the unsettled conditions of the country" or for any other reason. Section 8, Article 14 of the Constitution is, by its own terms, applicable only if claimants were prevented from complying with the acts of "February 10, 1852, August 15, 1870 and other acts—by the unsettled conditions of the country". The respondents never complied with the requirements of any of these acts but their reasons for failing to do so do not appear in this record. There might be an implied finding from the fact that the Supreme Court of Texas considered that Section 8, Article 14 of the Constitution was applicable, that it found that respondents had been prevented from complying with the requirements of the Act of August 15, 1870 "by the unsettled conditions of the country". However, since there is no evidence whatever in the record to support such a finding, this Court will examine the question in order to determine whether petitioner's rights have been denied on federal grounds. *Fiske* v. *Kansas*, 274 U. S. 480, 385, 386; *Creswill* v. *Grande Lodge Knights of Pythias*, 225 U. S. 246, 261.

5. THE COURT MAY DECREE A FORFEITURE IN THE PRESENT SUIT.

The respondents contended below and will, no doubt, contend here that there is no statute of Texas authorizing the Attorney General of Texas to bring a suit for forfeiture of land and no statute authorizing a "judicial inquiry" to determine such a forfeiture. The Courts below failed to notice this contention and treated the petitioner's pleadings as sufficient in this respect; however, to anticipate the contentions here we will discuss the question briefly.

The respondents cite several old cases, including *Wiederanders* v. *State*, 64 Tex. 133, decided in 1885, and *Bowmer* v. *Hicks*, 22 Tex. 155, decided in 1858, to prove that the Legislature has to date made no provisions for carrying out the forfeiture provisions of Sec. 8, Art. 14 of the Constitution of 1876.

In 1892 the Legislature passed a comprehensive Act "to limit and regulate the ownership by aliens of real estate in the State of Texas, and to provide for the escheat of lands held contrary to law". 10 Gammel's Laws of Texas, 370. Section 6 of that Act provides, in part, as follows:

> "It shall be the duty of the Attorney General or the district or county attorney, when he shall be informed or have reason to believe that lands in this state are being held contrary to the provisions of this act, to institute suit, in behalf of the State of Texas, in the district court of the county where such lands are situated, praying for the escheat of the same, on behalf of the state, as in cases of estates of persons dying without devise thereof and having no heirs, * * *"

The Act of 1892 was amended in 1921 (General Laws of the Thirty-seventh Legislature, 20 Gammel's Laws of Texas, 261) and that portion of the above-quoted language which appears in Article 172, R. S. 1926, was reenacted. These statutes make the holdings in the cases cited by Respondents obsolete.

In 1900 the Legislature passed an Act (Acts Twenty-sixth Texas Legislature, 1st C. S. page 33, Chap. 11, Sec. 8) relating to the Public Free School Land, which reads in part as follows:

> "When any public lands are held, occupied, or claimed by any person, association or corporation, adversely to the State, or to any fund or *when lands are forfeited to the State for any cause,* the Attorney General shall institute suit therefor, for rent thereon, and for any damages thereto." (Emphasis ours.)

The above quoted portion of this Act is at present found in Article 5420, Vernon's Annotated Civil Statutes of Texas.

In 1917 the Legislature passed a bill entitled, "An Act to Amend Section 1, Ch. 26, of the General Laws of the Thirty-third Legislature, 1913, State of Texas, more clearly defining some of the duties of the Attorney General, district and county attorneys of this State and imposing other and additional duties upon such officers, etc." This act provided in reference to the Attorney General that:

> "It shall also be his duty to institute and prosecute or cause to be instituted and prosecuted all suits and proceedings necessary to recover for and on behalf of the State all properties, real, personal, or mixed, that have escheated or that may escheat to this State under the provisions of Title 51, of the Acts of 1911, *or under any other law in existence, or that may hereafter be enacted.*"

Title 51 of the Acts of 1911 related to the forfeiture of charters of corporations for failure to pay franchise taxes, but the underscored language of the 1917 Act is broad enough to cover every other kind of forfeiture and escheat. The portion of the 1911 Act above quoted was brought forward in the 1925 codification and now appears as Article 4410, Vernon's Ann. Civil Statutes, which reads as follows:

> "The Attorney General shall institute and prosecute or cause to be instituted and prosecuted, all suits and proceedings necessary to recover for and on behalf of the State all properties, real, personal or mixed, that have escheated or may escheat to the State under the laws of the State."

Thus, in addition to Section 8 of Article XIV of the Constitution which prescribes the forfeiture, Articles 5420 and 4410, Revised Statutes of 1925, authorize the Attorney General and, in fact, impose upon him the duty to bring and prosecute suit to recover any lands forfeited or escheated to the State.

In the case of *New York and Texas Land Company* v. *Thompson* (1891), 83 Tex. 169, 17 S. W. 920, 923, the Supreme Court of Texas upheld the forfeiture provisions of Section 2 of Article 14 of the Constitution as applied to "unsatisfied genuine land certificates." In holding that certain of these certificates were void for failure to have them surveyed and field notes thereof returned to the General Land Office within five years after the adoption of the Constitution, the Supreme Court said:

> "If the owner of a certificate should file upon land, and cause the same to be surveyed, but should fail to have his field notes and the certificate returned to the land office before the expiration of the five years, *it will require no action on the part of the state to forfeit the location,* but it would be the duty of the Commissioner of the general land office to refuse to take any step looking to a patent."

This suit, of course, constitutes a "judicial inquiry" and the statutes noted above not only clothe the Attorney General with authority to bring the suit but they expressly make it his duty to do so.

It might also be noted that in a suit in trespass to try title (Title 124, R. S. of Texas, 1925) like the first count in petitioner's Third Amended Original Petition in this case (R. 18), the plaintiff may recover only a part of the premises sued for. Article 7386, R. S. of Texas, 1925, which is now Rule 802, Texas Rules of Civil Procedure, provides:

> "Where the defendant claims the whole premises, and the plaintiff shows himself entitled to recover part, the plaintiff shall recover such part and costs."

The third count in Petitioner's Third Amended Original Petition, on which the case was tried, sought recovery of an undivided interest in Padre Island equal to the percentage which the excess (19 leagues), over and above the 11½ leagues, bears to the total area of the island (30½ leagues) (R. 38). This 19 leagues (83,132 acres) is also recoverable under the First Count in the petition as a part of the whole tract sued for. The minority opinions of the Supreme Court of Texas would allow the recovery of the

19 leagues under the First Count, since they consider the 19 leagues as vacant and unappropriated public land not included within the boundaries of any prior survey.

The second count of Plaintiff's Third Amended Petition (R. 35) is a special alternative pleading seeking a forfeiture of the title on several grounds, among them being that no survey had been made and no plat and field notes of the Balli claim had ever been filed in the General Land Office of Texas. The first count in trespass to try title is sufficient also as a basis of a judgment of forfeiture. *Day Land and Cattle Co.* v. *State,* 68 Tex. 526, 4 S. W. 865; *Kenedy Pasture Co.* v. *State,* 111 Tex. 200, 231 S. W. 683, Cert. Den. 258 U. S. 617.

6. THE STATE IS NOT BARRED BY LIMITATIONS OR ESTOPPEL

It has always been, and still is, the law of Texas that the various statutes of limitations, adverse possession, peace and repose, do not operate against the State. The Republic of Texas first enacted the 3, 5 and 10 year statutes of limitations as to real estate on February 5, 1841. Each of these statutes provided that the law "shall not bar the government." Vol. 2, Gammel's Laws of Texas, pp. 631, 632. Articles 4622, 4623, and 4624 of Paschal's Digest of the Laws of Texas from 1754 to 1873 contained the 3, 5 and 10 year statutes of limitations. Each of these articles provides that the limitations "shall not bar the government." Chapter 1 of Title LXII, entitled "Limitations of Actions for Land," of the Revised Statutes of Texas, 1879, provides in Article 3200 that "the right of the State of Texas shall not be barred by any of the provisions of this chapter." Revised Statutes of Texas, 1879, p. 464. Chapter 1 of Title LXVII, entitled "Limitations," of the Revised Civil Statutes of Texas of 1895 provides in Article 3351 that "the right of the State shall not be barred by any of the provisions of this Chapter." Revised Civil Statutes of Texas, 1895, p. 648. The same provision is contained in Article 5683 of the Revised Civil Statutes of Texas, 1911, and Article 5517 of the Revised Civil Statutes of Texas, 1925. The identical provision is found in Article 5517 of Vernon's Civil Statutes of Texas. This rule is recognized by the Supreme Court of Texas in *Weatherly* v. *Jackson,* 123 Tex. 213, 71 S. W. (2d) 259 at pp. 264, 265, where the court stated:

> "Title cannot be acquired by adverse possession of land belonging to the state, and such possession is not evidence that the land possessed is not the property of the State. Similarly, long recognition by owners of adjacent surveys of certain lines as fixing the boundaries of the surveys cannot in any way affect public domain or appropriate any portion of it. *Ratliff* v. *Burleson,* 7 Tex. Civ. App. 621, 25 S. W. 983, 984, 26 S. W. 1003; *State* v. *Talkington* (Tex. Civ. App.) 274 S. W. 314, 316.
>
> "Defendants in error urge as additional grounds of estoppel the official maps in the Land Office, the adverse possession of the land with payment of taxes, and the failure of the Commissioners of the General Land Office, the Attorneys General and the Governors during the period of such possession to question the claim of defendants in error by instituting or causing to be instituted suit for the recovery of the land. On the authorities last above cited and for the reasons which have been set out in discussing the ruling of the Court of Civil Appeals on the question of estoppel and in passing upon the admissibility and probative value of the Land Office maps, these are not sufficient, singly or collectively, either to estop the state or to divest it of title. To the authorities may be added the rule that the failure of public officers to perform their duties will not work an estoppel against the state. 10 R. C. L. p. 705. This reference is not intended as a criticism of the public officials mentioned, for the state has made few, and no adequate, appropriations which

> could be used to discover or prove the existence of unsurveyed school land adversely possessed."

In *Humble Oil & Refining Co.* v. *State* (Tex. Civ. App.) 162 S. W. (2) 119, writ of error refused, the Court held:

> "The State's title is not affected by the lapse of time, laches, adverse possession or payment of taxes. It is not estopped or otherwise adversely affected by the dereliction or failure to act of its officers, nor by the declarations or acts or long recognition of others. These principles are so well established as to be now regarded as elementary. They are discussed in Weatherly v. Jackson, supra." 162 S. W. (2) 134.

In the very recent case of *Harris* v. *O'Connor,* Tex. Civ. App., 185 S. W. (2) 993, writ of error refused for want of merit, the Court stated:

> "Furthermore, it is fundamental that a state cannot be divested of a proprietary title by limitations, laches, recognition, etc., she is not bound by the defaults or negligence of her officers or agents. Day Land & Cattle Co. v. State, 68 Tex. 526, 4 S. W. 865, Jones v. Robison, 104 Tex. 70, 133 S. W. 879; Weatherly v. Jackson, 123 Tex. 213, 71 S. W. (2) 259; Grayburg Oil Co. v. State, Tex. Civ. App., 50 S. W. (2) 355, writ refused." 185 S. W. (2) 1009.

Neither the payment of taxes nor the recovery of tax judgments on public land affects the title of the government. *City of San Antonio* v. *Earnest* (Tex. S. Ct.) 188 S. W. (2) 775.

The majority opinion of the Supreme Court of Texas does not question the foregoing principles. They are the settled law of Texas as applied to land suits such as this, where the State is seeking to recover a portion of the public domain which has been set apart to the Public Free School Fund. The judgment below was intended to be within the framework of these well settled rules and not to do violence to them. See dissenting opinion, (R. 370).

7. THERE IS NO POSSIBILITY OF A SPANISH GRANT

This case was tried on the theory that the rights inuring to respondents, if any, by virtue of proceedings occurring prior to December 19, 1836, were established by the 1827-30 proceedings which expressly occurred "under the Colonization Laws of Tamaulipas and of Mexico" then in force, and that such proceedings were tested for validity and effect by those laws.

However, in the appeal of this case and into the majority opinion there has crept the intimation (R. 329), although not the direct holding, that *possibly* Respondents' rights are not governed by the Colonization Laws of Mexico and Tamaulipas in force in 1827-30 and the proceedings which occurred in 1827-30 expressly "in accordance with the Colonization Laws." This suggestion admittedly rests solely upon the *possibility* of a grant from Spain prior to 1827. There is not a single document, proceeding or statement emanating from Spain or transpiring before the Spanish authorities to support the claim of the possibility of a Spanish Grant.

The whole of Respondents' claim and the majority opinion's intimation as to the possibility of a *Spanish Grant* prior to 1827 is based upon two circumstances, to-wit:

1. The statement in the revoked will of Nicolas Balli, dated in 1811, in which he said:

> "I claim as my property the grazing pasture of the Island, while I am not in possession, this is due to the unsettled times, but in fact I had it surveyed and adjudicated * * *" (R. 130).

2. The statement in the Report of Bourland and Miller in 1851 in which it was said:

> "Nicolas Grisanti and Jose Maria Tobar apply for $11\frac{1}{2}$ leagues of pasture land called 'Padre Island' originally granted by the Spanish Government to one Nicolas Balli and subsequently confirmed to him and his nephew Juan Jose Balli by the Mexican Authorities * * *" (R. 202).

Opposed to the first statement is the final Will of Nicolas Balli, dated in 1828, in which his sole claim was to eleven leagues of pasture land, which he stated he had had surveyed and allotted by, and was *adjusting* titles *with the* State of Tamaulipas, without any mention of a Spanish Grant (R. 177, 178).

Also, directly opposed to the first statement is the statement by Nicolas Balli, through his attorney in fact, in the very application he made in 1827 for land on the island, in which it was stated that if a testimonio of *incomplete* proceedings in an attempt to secure a grant from Spain were not found (and they were not found), then that such application should be accepted as a *new* denouncement of the land in accordance with the *Colonization Law* (R. 132).

And the Governor so accepted the application, after the incomplete proceedings were not located, and more than once expressly stated that all proceedings should be in accordance with the "Colonization Law" (R. 133, 134).

It was expressly held by the Supreme Court of Texas on remarkably similar facts, in *Edwards* v. *Davis,* 3 Tex. 321, that a claimant, having applied for a new grant under Mexican laws, had abandoned his Spanish Grant Claim and was bound by the provisions of the Mexican Colonization laws.

As to the second statement quoted, that of Bourland and Miller, it is plainly nothing more than the unsupported legal conclusion of individuals who were appointed to investigate and decide the *facts.* To accept their legal conclusion that a grant had been issued from Spain, at an undisclosed time, and a re-grant from Mexico, while rejecting their *finding of fact* that the Ballis had grazed sufficient cattle and had maintained only sufficient possession to entitle them to the grant of 11½ leagues would amount to substituting for the judgment of this Court and the Legislature an unauthorized *legal conclusion* of the Commissioners, while rejecting their *fact finding* as to the actual, physical facts of *possession* and the extent of the Ballis' asserted claim.

And, in addition, any claim that a Spanish grant may possibly have been issued and lost in the wreck of the steamer Anson is further rebutted by this admission of Respondents' counsel, the late Honorable F. W. Seabury, at the trial:

> "In order to get the facts clear in the court's mind and of counsel, under the Spanish law the protocol contains the original instrument, which is kept in the office of the Alcalde or Notary Public and the interested party is given the copy and we have here in evidence already a copy of the original in the protocol at Matamoros, the photostatic copy, and this is the first copy issued from there in 1846 to Jose Maria Tovar on the petition setting forth that he is the owner in part of that land and wanted to get a testimonio issued to him for such purpose; and in 1847, the following year, Grisante also an owner in common of Padre Island, got this identical testimonio and asks that the notary public at Matamoros be instructed to issue to him an integral testimonio for his protection and that notary public at Matamoros issued that copy to him and that was recorded here. At this point, we have in existence therefore the original in Matamoros the protocol and this duplicate original in the possession of Tovar and

> another copy of the Tovar's recorded here—and we know from the report of Messrs. Bourland and Miller that a title was exhibited to them and filed with them and we know from that report that that was lost in the wreck of the steamer Anson, the one lost in the wreck of the steamer Anson was not the protocol in Matamoros and is not this testimonio, but is the instrument, the second one given to Grisante, recorded in Nueces county, and on it these commissioners upheld the grant, though they wanted to limit the quantity. It was the instrument upon which that report was founded and the Legislature confirmed this grant upon this copy that is on record here today and in the meantime the original copy of it remains in the possession of Tovar—and the fact that it is mutilated can be expected from its age. We have enough of it here to show what it is and the terms can be gotten and we have the certificate of the Notary Public and the order of the Alcalde, directing the Notary Public to make that testimonio and, by fortunate chance, it has been kept all these years" (R. 77, 78).

The English translation of the *expediente,* or instructive dispatch, printed on pages 131 to 177 of the record is respondents' Exhibit No. 9A. There is being sent up with the record for inspection of this court a duplicate of Exhibit 9(d), which was introduced as respondents' Exhibit No. 11(d). Vol. 1, Exhibits, p. 22a. This exhibit is a photostat of the *expediente* in Spanish and it contains a photostatic copy of a tracing of the original de la Fuente map showing his survey in 1828. There is not in any of these documents any instrument issued by the King of Spain or under his authority and nothing to show the existence of any such instruments. It is significant, also, that none of the copies of the original protocol show any final grant or title from the State of Tamaulipas to the Ballis, although the copies were made after the Texas Revolution (1836) and after Texas was admitted as a State of the Union (1845).

8. CASES IN THIS COURT INVOLVING MEXICAN OR SPANISH GRANTS IN TEXAS

The only cases that we know of involving Mexican or Spanish grants of land in Texas which have reached the Supreme Court of the United States are the following:

League v. *DeYoung* (1850) 11 How. 185, 13 L. Ed. 657;
McKinney v. *Saviego* (1855) 18 How. 235, 15 L. Ed. 365;
White v. *Burnley* (1857) 61 U. S. (20 How.) 235, 15 L. Ed. 886;
League v. *Egery* (1860) 24 How. 264, 16 L. Ed. 657;
Foote v. *Egery* (1860) 24 How. 267, 16 L. Ed. 656;
Christy v. *Pridgeon* (1866) 4 Wall. 196, 18 L. Ed. 322;
United States v. *Pico* (1866) 5 Wall. 536, 18 L. Ed. 695;
Cavazos v. *Trevino* (1867) 6 Wall. (73 U. S.) 773, 18 L. Ed. 813;
Basse v. *City of Brownsville* (1874) 154 U. S. 610, 22 L. Ed. 420;
Gonzales v. *Ross* (1886) 120 U. S. 605;
Sullivan v. *Texas* (1907) 207 U. S. 416.

Three of the foregoing cases, *League* v. *DeYoung, Basse* v. *City of Brownsville,* and *Sullivan* v. *Texas,* were brought to this Court by writ of error to the Supreme Court of Texas. This Court dismissed the writ in *Basse* v. *Brownsville* because "the treaty of Guadalupe-Hidalgo had no relation to property included within the State of Texas." A writ of certiorari was applied for in *Kenedy Pasture Co.* v. *State,* 111 Tex. 200, 231 S. W. 683, but it was denied (1921) 258 U. S. 617. The State of Texas has never before applied to this Court to review any case involving Mexican or Spanish grants in Texas.

The case of *League* v. *DeYoung* arose under the laws of the Republic of Texas and before the Constitution of the United States became applicable by reason of Texas' admission to the union in 1845. The case is interesting in that it reviews the laws of the State of Coahuila and Texas, Mexico and the Republic of Texas relating to public land. The case of *Sullivan* v. *Texas* involved a construction of the Act of February 10, 1852, and the rights of claimants under a Mexican grant who asserted that the boundaries of the original grant included more land than was included in the resurvey which was made pursuant to the terms of that act, after the Mexican grant had been validated. This Court affirmed the judgment of the Supreme Court of Texas which limited the claimants under the Mexican grant to the land included in the resurvey.

The cases of *League* v. *Egery, Foote* v. *Egery* and *Christy* v. *Pridgeon* were reviewed on writs of error issued to the United States District Courts. Each of these cases affirmed decisions holding that the Mexican grants involved were void because they were issued without the previous approbation of the President of Mexico.

In none of the cases decided by this Court has there been any discussion of the rights of the State of Texas under the guarantees contained in the Annexation Agreement to the "vacant and unappropriated lands" of the Republic of Texas. The only suggested conflict that we have been able to find between the guarantees assumed by the United States in the Annexation Agreement with the Republic of Texas and the Treaty of Guadalupe-Hildago with the Republic of Mexico is the language of the Federal District Court for the Southern District of Texas in *Amaya* v.

Stanolind Oil and Gas Company, 62 Fed. Supp. 181, 195. In that case the District Court said:

> "In considering the surrounding facts pertaining to the ratification of this Treaty, it is well to bear in mind these well known facts: Previous to the Treaty of Guadalupe Hidalgo, by the annexation agreement with Texas, it was provided that Texas should retain absolute title and control over the vacant and unappropriated lands within the state. It is very probable that the annexation would not have resulted had such agreement not been made. This annexation took place nearly one hundred years ago, and throughout all that period the United States has consistently maintained a policy of non-interference concerning the lands of and in Texas. In other words, the United States has respected such annexation agreement thoroughly and consistently. It is not logical to believe that it was the intention of the United States to agree to anything in the Treaty of Guadalupe Hidalgo which would in any manner conflict with the annexation agreement made with the Republic of Texas. Directly in line with this contention respecting the sovereign right of Texas to maintain control over its lands, is the attitude of the United States in the negotiations with Mexico which resulted in the adoption of the very treaty now being considered by the court."

This Court considered the boundaries of Texas as determined by the Laws of the Republic of Texas and the Annexation Agreement in the cases of *United States* v. *Texas,* 143 U. S. 621, *United States* v. *Texas,* 162 U. S. 1, and *Oklahoma* v. *Texas,* 252 U. S. 372 and subsequent opinions in the same case. These three cases were original proceedings in this Court and they involved the northern boundary of Texas between Texas and Oklahoma and the construction of the Treaty of 1819 between Spain and the United States.

The questions which are raised in this case in reference to the Annexation Agreement were not considered in those cases.

Respectfully submitted,

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APPENDIX

1. The ***Annexation Agreement*** between the United States, the Republic of Texas, the People of Texas and the State of Texas, consists of (1) a joint resolution of Congress of March 1, 1845 (5 Stat. at L. 797), (2) a joint resolution of the Congress of the Republic of Texas of June 23, 1845 (2 Gammel's Laws of Texas, 1225-1227; Paschal's Dig., Laws of Texas, Vol. 1, p. 45; Vol. 1, Sayles' Early Laws of Texas, Art. 1531), (3) an ordinance by the deputies of the People of the Republic of Texas in convention assembled on July 4, 1845 (1 Gammel's Laws of Texas, 1228-1230; Paschal's Dig. Laws of Texas, Vol. 1, p. 45), (4) a joint resolution of Congress of December 29, 1845 (9 Stat. at L. 108; Paschal's Dig. Laws of Texas, Vol. 1, p. 46) and (5) a joint resolution of the Texas Legislature of April 26, 1846. (2 Gammel's Laws of Texas, 1461; Paschal's Dig. Laws of Texas, Art. 441. These several laws are copied in the order above listed on pages 86 to 94.

2. Pertinent Portions of the Texas Act of February 10, 1852, pages 94-95.

3. Article VIII of the Treaty of Guadalupe-Hidalgo, p. 95.

4. Section 4, Article 13 of the Texas Constitution, p. 96.

5. Article 88, Vol. 1, Sayles' Early Laws of Texas, p. 97.

JOINT RESOLUTION FOR ANNEXING TEXAS TO THE UNITED STATES

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, towit: First, said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. Second. Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to said Republic of Texas, shall retain all the public funds, debts, taxes and dues of every kind, which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States. Third. New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri compromise line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri compromise line, slavery, or involuntary servitude (except for crime) shall be prohibited.

3. And be it further resolved, that if the President of the United States shall in his judgment and discretion deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then,

Be it resolved, That a State, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two representatives in Congress, until the next apportionment of representation, shall be admitted in to this Union, by virtue of this act, on an equal footing with the existing states, as soon as the terms and conditions of such admission and the cession of the remaining Texian territory to the United States shall be agreed upon by the Government of Texas and the United States; and that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two houses of Congress, as the President may direct. Approved March 1, 1845.

5 Stat. at L. 797, 798.

JOINT RESOLUTION

GIVING THE CONSENT OF THE EXISTING GOVERNMENT TO THE ANNEXATION OF TEXAS TO THE UNITED STATES

Whereas, the Government of the United States hath proposed the following terms, guarantees, and conditions, on which the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, and admitted as one of the States of the American Union, towit:

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the terri-

tory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of Government, to be adopted by the people of said Republic, by deputies in Convention assembled, with the consent of the existing Government, in order that the same may be admitted as one of the States of this Union.

"2. And be it further resolved, That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, towit:

"First. Said State to be formed, subject to the adjustment by this Government of all questions of boundary that may arise with other governments; and the Constitution thereof, with the proper evidence of its adoption, by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six.

"Second. Said State, when admitted into the Union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense, belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes and dues of every kind, which may belong to or be due and owing said Republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States.

"Third. New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and

> having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution. And such states as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri compromise line, shall be admitted into the Union, with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri compromise line, slavery, or involuntary servitude (except for crime) shall be prohibited."

And whereas, by said terms, the consent of the existing government of Texas is required—Therefore,

Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That the government of Texas doth consent, that the People and territory of the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of Government, to be adopted by the People of said Republic, by Deputies in Convention assembled, in order that the same may be admitted as one of the States of the American Union; and said consent is given on the terms, guarantees, and conditions set forth in the Preamble of this Joint Resolution.

Sec. 2. Be it further resolved, That the proclamation of the President of the Republic of Texas, bearing date May fifth, eighteen hundred and forty-five, and the election of Deputies to sit in Convention at Austin, on the fourth day of July next, for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing Government of Texas.

Sec. 3. Be it further resolved, That the President of Texas is hereby requested immediately to furnish the Government of the United States, through their accredited Minister near this Government, with a copy of this Joint Resolution; also to furnish the Convention to assemble at

Austin, on the fourth of July next, a copy of the same—and the same shall take effect from and after its passage.

John M. Lewis,
Speaker of the House of Representatives.
K. L. Anderson,
President of the Senate.

Approved, June 23, 1845.

Anson Jones.

2 Gammel's Laws of Texas, 1225-1227.

IN CONVENTION OF THE PEOPLE OF THE REPUBLIC OF TEXAS JULY 4, 1845

AN ORDINANCE

Whereas the Congress of the United States of America has passed resolutions providing for the annexation of Texas to that Union, which resolutions were approved by the President of the United States on the first day of March one thousand eight hundred and forty-five; and whereas the President of the United States has submitted to Texas the first and second sections of the said resolution, as the basis upon which Texas may be admitted as one of the States of the said Union; and whereas the existing government of the Republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows,

JOINT RESOLUTION FOR ANNEXING TEXAS TO THE UNITED STATES

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent, that the territory, properly included within and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. And be it further resolved, that the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, towit: First. Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments; and the constitution thereof, with the proper evidence of its adoption by the people of said republic of Texas, shall be transmitted to the president of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. Second. Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defense belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said state may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. Third. New states, of convenient size, not exceeding four in number, in addition to said state of Texas and having sufficient population, may hereafter, by the consent of said state, be formed out of the territory, thereof, which shall be entitled to admission under the provisions of the federal constitution. And such states as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri compromise line, shall be admitted into the Union, with or without slavery, as the people of each state asking admission may desire. And in such state or states as shall be formed out of said territory north of said Missouri compromise lines, slavery, or involuntary servitude (except for crime) shall be prohibited.

Now, in order to manifest the assent of the people of this republic, as required in the above-recited portions of the said resolutions, We, the deputies of the people of Texas in convention assembled, in their name and by their authority, do ordain and declare, that we assent to, and accept the proposals, conditions, and guaranties contained in the first and second sections of the resolutions of the Congress of the United States aforesaid.

Done at the City of Austin, Republic of Texas, July 4th, 1845.

Tho. J. Rusk, President.

Paschal's Anno. Digest, Laws of Texas, p. 44, 45. Vol. 2, Gammel's Laws of Texas, p. 1228-1230.

JOINT RESOLUTION OF THE CONGRESS OF THE UNITED STATES ADMITTING TEXAS INTO THE UNION

Whereas, the Congress of the United States, by a joint resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to, the Republic of Texas, might be erected into a new state, to be called the State of Texas, with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same might be admitted as one of the states of the Union, which consent of congress was given upon certain conditions specified in the first and second sections of said joint resolution; and whereas, the people of the said republic of Texas, by deputies in convention assembled, with the consent of the existing government, did adopt a constitution, and erect a new state with a republican form of government, and in the name of the people of Texas, and by their authority, did ordain and declare that they assented to, and accepted the proposals, conditions and guarantees contained in said first and second sections of said resolution; and whereas, the said constitution, with the proper evidence of its adoption by the people of the republic of Texas, has been transmitted to the president of the United States and laid before congress, in conformity to the provisions of said joint resolution; therefore,

Resolved, by the senate and house of representatives of the United States of America, in Congress assembled, That the state of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

Section 2. And be it further resolved, That until the representatives in congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the State of Texas shall be entitled to choose two representatives. Approved December 29, 1845. Paschal's Digest, Laws of Texas, Vol. 1, p. 46. 9 Stat. at L. 108.

JOINT RESOLUTION OF APRIL 26, 1846, DECLARING THE EXCLUSIVE RIGHT OF THE STATE OF TEXAS TO THE JURISDICTION OVER THE SOIL INCLUDED WITHIN THE LIMITS THEREOF

Art. 441. (1634) (1) That the exclusive right to the jurisdiction over the soil included in the limits of the late republic of Texas, was acquired by the valor of the people thereof, and was by them vested in the government of the said republic; that such exclusive right is now vested in and belongs to the state, excepting such jurisdiction as is vested in the United States, by the constitution of the United States, and by the joint resolution of annexation, subject to such regulations and control as the government thereof may deem expedient to adopt; that we recognize no title in the Indian tribes, resident within the limits of the state, to any portion of the soil thereof; and that we recognize no right in the government of the United States to make any treaty of limits with the said Indian tribes, without the consent of the government of this state. Paschal's Anno. Digest, Laws of Texas, Vol. 1, p. 192, 193.

AN ACT TO RELINQUISH THE RIGHT OF THE STATE TO CERTAIN LANDS THEREIN NAMED, APPROVED FEBRUARY 10, 1852, THE PERTINENT PORTIONS OF WHICH READ AS FOLLOWS:

"Section 1. Be it enacted by the Legislature of the State of Texas, That the State of Texas hereby relinquishes all her right and interest in the following described lands to the original grantees thereof, their heirs and legal assigns, towit:

County of Cameron

"(12) Nicolas Balli and Juan Jose Balli, eleven and a half leagues called 'Padre Island';

"Sec. 2. That it shall be the duty of those claiming any of the lands named in this act, to have the same surveyed by the District or County Surveyor of the County in which the same may be situated, and upon the return of the field notes thereof, to the General Land Office, the Commissioner is hereby authorized and required to have the same plotted on the maps of his office, and issue patents for the same in accordance with existing laws; provided, that no patent shall issue for a less amount than the original grant. That the owners of said lands shall be required to pay the taxes due on the same, from the date of the organization of the respective counties herein mentioned; which taxes shall be paid, and legal vouchers for the same exhibited to the Commissioner of the General Land Office, before the patent to the same shall issue."

"Sec. 5. That the confirmation herein extended to the lands mentioned in this act, shall in no way be construed to interfere with any rights which may have accrued to other parties before the passage of this act, but the same shall remain without prejudice; provided, that nothing in this act shall be so construed as to relinquish the rights of the State to any of the Islands or Salt Lakes situated in the territory embraced in this Act."

3 Gammel's Laws, 941, 946, and 949.

Treaty of Guadalupe-Hidalgo

Article VIII—"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account to any contribution, tax, or charge whatever.

"Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

"In said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

9 Stat. at L. 929, 930.

Section 4, Article 13 of the Texas Constitution of 1876

No claim of title or right to land, which issued prior to the thirteenth day of November, 1835, which has not been duly recorded in the county where the land was situated at the time of such record, or which has not been duly archived in the General Land Office, shall ever hereafter be deposited in the General Land Office, or recorded in this State, or delineated on the maps, or used as evidence in any of the courts of this State, and the same are stale claims; but this shall not affect such rights or presumptions as arise from actual possession. By the words "duly recorded" as used in Sections two and four of this Article, it is meant that such claim of title or right to land shall have been recorded in the proper office, and that mere errors in the certificates of registration; or informality, not affecting the fairness and good faith of the holder thereof, with which the record was made, shall not be held to vitiate such record.

2 Vernon's Annotated Texas Statutes, 556.

"ARTICLE 88. TERRITORY OF TEXAS FORMERLY INCLUDED IN THE STATE OF TAMAULIPAS

"That portion of Texas situated between the Rio Grande and Nueces Rivers, south of a line drawn from the northern boundary of Webb County to the mouth of Moros Creek, on the Nueces river, was originally a part of the State of Tamaulipas, in Mexico, whose capital was Victoria, some distance west of the Rio Grande. That section of country was but sparsely settled, and was used principally for stock ranches, that had long been subject to frequent depredations from savage Indians. On the 19th of December, 1836, an act of the congress of Texas was passed, defining the boundaries of Texas, in which that territory was included. Notwithstanding that, however, the State of Texas exercised no permanent jurisdiction over it, except along and near the Nueces river, including Corpus Christi, on the Gulf; and the State of Tamaulipas exercised jurisdiction on and near the Rio Grande, on the eastern side of it, until after the annexation of Texas to the United States (on the 29th of December, 1845) shortly after which armed occupation of the disputed territory was taken by the United States, on behalf of Texas, since which time Texas has exercised jurisdiction over it.

"By the 'Articles of Annexation' consent was given by the United States, 'that the territory properly included within and rightfully belonging to the Republic of Texas may be erected into a new state, to be called the State of Texas' upon certain conditions and guarantees, one of which was that the state to be formed should be 'subject to the adjustment by the government on all questions of boundary that may arise with other governments.' The assent of Texas to these terms was formally given in the convention, by an ordinance, on the 4th day of July, 1845. On the 29th day of April, 1846, the Legislature of Texas adopted a joint resolution, declaring 'that the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas was acquired by the valor of the people thereof, and was by them vested in the government of the republic; that such exclusive right is now vested in and belongs to the state, excepting such jurisdiction as is vested in the United States by the constitution of the United States and by the joint resolution of annexation, subject to such regulations and control as the government thereof may deem expedient to adopt.' On the 2d of February, 1848, the treaty of peace, of Guadalupe Hidalgo, between the United States and Mexico, was concluded, by which the Rio Grande was established as the line between the United States and Mexico, and thereby settling the boundary of Texas, in reference to this part of the country, as between Texas, in the United States, and Tamaulipas, in Mexico. As between Texas and the United States, the right of Texas to the jurisdiction over the territory east of the Rio Grande was definitely settled by the act of Congress (called one of the compromise acts), on the 9th day of September, 1850, and acceded to by Texas on the 25th of November, 1850. This had reference, however, particularly to the cession, by Texas to the United States, of that portion of New Mexico east of the Rio Grande. By the treaty of Guadalupe Hidalgo it was stipulated that the civil rights of Mexicans, within the territory ceded to the United States, as they then existed under the laws of Mexico, should be protected by the United States.

"The inhabitants, and others owning lands by titles, perfect and imperfect, within the territory east of the lower part of the Rio Grande, not having had the same opportunities as persons in other parts of Texas, to have their titles established and recognized by the authorities of Texas, a law was passed for that purpose as early as 1850, and another in 1854, under which commissioners were appointed to investigate and report upon their titles, many of which were confirmed as valid by an act of the Legislature of 1852. For the same object another law was passed in 1860, authorizing suits to be brought against the state in the counties where situated.

"The object of all these laws, as therein expressed, was to ascertain what lands the state should recognize as justly belonging to individuals, whether the titles from the former government were perfect or imperfect, and to have them surveyed, mapped and patented, but not to interfere with any superior rights that might have been acquired by third persons previous to the passage of said laws. By the law of 1860, authorizing a suit to establish such right or title, it was provided that 'all lands, the claims to which shall be finally rejected in the manner herein provided, shall be deemed, held and considered as part of the public domain of the state.'

"For the same purpose, and in similar terms, another act of the legislature was passed on the 15th of August, 1870, providing that 'any person who may be the original grantee, heir or assignee of any grant of land, emanating from the Spanish or Mexican governments, and having its origin previous to the 19th day of December, A. D. 1836, and situated between the Nueces and Rio Grande rivers, and below a line drawn from the northern line of Webb county to the mouth of the Moros creek, emptying into the Nueces river, may file a petition to the district court of the county of Travis, or where the capitol of the state may be, 'which shall contain a full description of the land claimed, setting forth particularly its situation, boundaries and extent, and shall accompany such petition with the titles, or evidences of titles, or right under which the same is held or claimed, and the said district court shall investigate the same, in accordance with the laws of nations, the laws, usages and customs of the government from which the claim is derived, and the principles of equity, so far as the same are applicable, and shall give judgment for the confirmation of the same when the title is perfect; or, when imperfect, when the same would have matured into a perfect title, under the laws, usages and customs of the government under which it originated, had its sovereignty over the same not passed to and been vested in the Republic of Texas, provided said title or right was originally founded in good faith.' (The State v. Sais, 47 T. p. 309; see Constitution, Art. 14, paragraph 8; Sayles' Civil Statutes, Vol. 4 p. 574)" John Sayles and Henry Sayles, Sayles' Early Laws of Texas, the Gilbert Book Company, St. Louis, 1891.

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FILED

MAY 17 1946

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1049

THE STATE OF TEXAS,
Petitioner,
vs.
ALBERTO BALLI, ET AL.,
Respondents.

RESPONDENTS' BRIEF OPPOSING WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1049

THE STATE OF TEXAS,
Petitioner,
vs.
ALBERTO BALLI, *ET AL.*,
Respondents.

RESPONDENTS' BRIEF OPPOSING WRIT OF CERTIORARI

Opinions Below

The opinion of the Texas Court of Civil Appeals, Fourth Supreme Judicial District, is reported as *State* v. *Balli,* 173 S. W. 2d 522.

The opinion of the Supreme Court of Texas is reported as *State* v. *Balli,* 190 S. W. 2d 71.

Statement

This suit originated in the District Court of Nueces County, Texas, as an action by the State of Texas, as proprietor of all vacant and unappropriated public domain within its boundaries, to recover an island, or sandbar, called "Padre Island," long held and claimed by Respondents and their predecessors in title, under a grant from the Mexican State of Tamaulipas, confirming an earlier survey and adjudication by the Government of Spain.

"Padre Island" is a long, low, sandy island, situated on the coast of Texas, between the rivers Nueces and Rio Grande, called, during the eighteenth century, "*La Isla de las Malaguitas,*" from the tribal name of its inhabitants; and "*Isla Blanca,*" from its composition of white sand. [Bolton: *Texas in the Middle Eighteenth Century.* Berkeley, California, 1915, pp. 104-106.]

This island was occupied "about the year 1800, when the Count of Sierra Gorda was Governor," by the Padre Nicolas Balli (or Vallin), and by 1821, had come to be known as "*La Isla del Padre Vallin.*" [Oberste: *History of Refugio Mission,* Refugio, Texas, 1942, pp. 290-293.] Official documents in evidence reflect that it was called, indifferently, "*La Isla del Santiago,*" and "*La Isla del Corpus Christi,*" by the officials of Tamaulipas in 1828-1829; and "*The Island of Corpus Christi, known by the name of the Island of the Padre Balli*" in documents executed after 1846. This name was shortened to "*Padre Island,*" during the 1850-1852 proceedings, by which name it is identified in many documents executed since.

Respondents defended upon the grounds that "Padre Island" had been

(1) Surveyed and adjudicated (about the year 1800) by the Spanish Government in America to the Padre Nicolas Balli; (Sections 26-29 *General Colonization Law of Tamaulipas,* December 15, 1826; Art. 89 *Sayles Early Laws of Texas* I—133, 136; Gammel's Laws of Texas I—454) [R. 130]

(2) Adjudicated, surveyed and granted to the Padre Nicolas Balli and his nephew, Juan Jose Balli, by the proper authorities of the Mexican State of Tamaulipas, during the years 1828 and 1829, in satisfaction of the former's rights under the Spanish Government, by valid and customary proceedings for the making of such grants; [R. 131-177 inc.]

(3) Relinquished and confirmed to said Nicolas Balli and Juan Jose Balli by an Act of the Legislature of Texas, approved February 10, 1852; [R. 410, 411, 413]

(4) Used, held, occupied and enjoyed by Respondents and their predecessors in title, under claim of right, continuously from "about the year 1800 when the Count of Sierra Gorda was Governor" until the present date. [R. 414-423 inc.]

Questions Presented

The major questions presented were but three:

(1) Did Respondents prove a valid title to Padre Island, originating under the laws of Mexico and Spain?

(2) If so, was this a cession of the entire island, or was it limited to 11.15 square leagues of land?

(3) Did alluvion forming on the shores of the island, subsequent to its cession to the Ballis in 1829, become the property of the owners of the Balli title, or did it inure to the benefit of the State?

Petitioner, the State of Texas, added two subsidiary claims:

(4) That the Balli title to Padre Island was not confirmed by the Texas General Relinquishment Statute of February 10, 1852.

(5) That the Balli title is forfeit, in that its owners did not cause their grant to be surveyed, and file field notes of survey in the General Land Office, within the time prescribed by Section 8, Article XIV, of the Constitution of Texas of 1876. (Petitioner's Application and Brief, pp. 9, 61-71)

These secondary contentions are inconsistent within themselves. Section 8, Article XIV, of the Constitution of Texas could not, by its terms, apply to Padre Island, unless the Balli title was regular and valid, and confirmed by the General Relinquishment Statute of February 10, 1852.

The State's claim that the Balli title was not confirmed by the General Relinquishment Statute of 1852, does violence to accepted canons of construction; and, after the three basic questions had been resolved in favor of the Balli title, became of no importance in the case.

By its final proposition, the State asked the courts to imply a forfeiture from the terms of an article of the Texas Constitution, which, in the two-thirds of a century since its adoption, had never been so construed. Petitioner cites the annexation agreement between Texas and the United States [Petitioner's Application and Brief, pp. 5-7, 50-52, 86-91], which provided that the new state of Texas should *rétain* "all vacant and unappropriated lands lying within its limits". *Lands theretofore granted by the government of Spain, the Mexican State of Tamaulipas, and the Republic of Texas were not "vacant and unappropriated". In this case the ultimate question decided by the Supreme Court of Texas was the mixed question of law and fact * * * as to whether the Island in question is "vacant and unappropriated public domain," and, as such, owned by the State of Texas; or whether it had passed into private ownership by valid grant to Respondents' predecessors in title, under the laws of Tamaulipas effective when the grant was made.* This was a matter of local law to be determined by the Supreme Court of Texas.

Petitioner's efforts to inject a constitutional question (Petitioner's Brief, pp. 50-60) are predicated upon passing references in the Texas courts' opinions to the protective effect of the Treaty of Guadalupe Hidalgo, and upon a mention of the Constitution of the United States in the opinion of the Supreme Court of Texas; where, after having overruled the State's contention that Section 8, Article XIV, of the Texas Constitution should be construed as working a forfeiture, it said:

State v. *Balli,* 190 S. W. 2d 71, 84:

> ". . . We are also of the opinion, as was suggested by the Honorable Court of Civil Appeals, that to construe the quoted section of the Constitution in accordance with the contentions of the State would necessarily raise serious constitutional questions. This is certainly true in the light of clause 2, Article 6, of the Constitution of the United States and certain other constitutional

> provisions, including those prohibiting the impairment of obligations of contract, the denial to any citizen the equal protection of the laws, and the taking of private property without due process of law. Mr. Justice BRADLEY remarked in Gonzales *v.* Ross, 120 U. S. 605, 7 S. Ct. 705, 717, 30 L. Ed. 801, 809: 'A man whose title was good in 1876, when the constitution was adopted, whether his muniments of title were on record or not, could not be deprived of it by a simple *ipse dixit* of the constitution any more than by a legislative act.' "

Which is to say that of two possible constructions of a state constitution or statute, the courts prefer a construction which is not in conflict with the Supreme Law of the land.

Respondents' Points in Opposition to Certiorari

Respondents submit that the writ of certiorari should be denied in that

Respondents' Point No. One

References in the opinion of the Supreme Court of Texas to the Constitution of the United States, or to the Treaty of Guadalupe Hidalgo made under its authority, did not create a federal question cognizable by the Supreme Court of the United States.

Respondents' Point No. Two

It is the function of the Supreme Court of Texas to know and determine the laws under which lands were granted by a former sovereign within the present limits of Texas; and its holdings as to such laws are binding upon the Supreme Court of the United States.

Respondents' Point No. Three

Title to land acquired by accretion, or alluvion, is a title acquired by the laws of the State in which the land is situated; which each State determines for itself.

Respondents' Point No. Four

Where no question of the validity of a State statute under the Federal Constitution is presented, the federal courts are bound to follow the decisions of the highest court of a State upon questions relating to the State Constitution and its application to the laws of the State.

Respondents' Point No. Five

The Supreme Court of Texas decided every question presented in strict accord with the applicable decisions of the Supreme Court of the United States.

Respondents' Point No. One, Re-stated

References in the opinion of the Supreme Court of Texas to the Constitution of the United States, or to the Treaty of Guadalupe Hidalgo made under its authority, did not create a federal question cognizable by the Supreme Court of the United States.

Three of the five basic questions ruled upon by the Supreme Court of Texas had to do with rights to land situated in Texas; the fourth to the proper construction of a Texas statute, and the fifth to the interpretation of an article of the Texas Constitution of 1876.

All were matters of local law, as to which the considered opinions of the Supreme Court of Texas are binding upon the courts of the United States.

White v. *Burnley,* 20 How. (U. S.) 235; *League* v. *Egery,* 24 How. (U. S.) 264, 266, 267; *Christy* v. *Pridgeon,* 4 Wall. 196, 203; and more recently, *Kenedy* v. *Texas,* 258 U. S. 617; denying certiorari to the Supreme Court of Texas in *Kenedy Pasture Co.* v. *State,* 111 Tex. 200.

In so far as the rule of conciseness allows, Respondents have undertaken below to state the applicable law in the language of the courts (italics ours). On the direct issue, the Supreme Court of the United States in *League* v. *Egery, supra,* said:

> ". . . In accordance with well-established principles in this court, *we accept this uniform and stable body of judicial decision from the court of last resort of the State in which the property is situated,* and in which the transactions that form the subject of this litigation took place, as *conclusive testimony of the rule of action prescribed by the authorities of the State,* as applicable to their interpretation and adjustment. *We do not inquire whether a more suitable rule might have been adopted, nor whether the arguments which led to its adoption were forcible or just.* We receive the decisions having the character that are mentioned in the extract we have made from *the opinion of the Supreme Court of Texas as having a binding force almost equivalent to positive law. . . .*"

Christy v. *Pridgeon, supra,* is even more explicitly in point:

> "This law of 1824, though general to the Republic of Mexico, was, so far as it affected lands within the limits of Texas, after the independence of that country, a local law of the new State—as much so as if it had originated in her legislation. It had at the time no operation in any portion of what then constituted the United States. The interpretation, therefore, placed upon it by the highest court of that State must, according to the established principles of this court, be accepted as the true interpretation, so far as it applies to titles to lands in that State, whatever may be our opinion of its original soundness. *Nor does it matter that in the courts of other States, carved out of territory since acquired from Mexico, a different interpretation may have been adopted. If* such be the case, *the courts of the United States will, in conformity with the same principles, follow the different ruling so far as it affects titles in those States. The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different States to a similar*

> *local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other. . . .*"

Citing *Shelby* v. *Guy,* 11 Wheat. 361, 367; where it is said:

> "That the statute law of the States must furnish the rule of decision of this court, as far as they comport with the Constitution of the United States, in all cases arising within the respective States, is a position that no one doubts. *Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction.* It is obvious that this admission may, at times, involve us in seeming inconsistencies—as, where States have adopted the same statutes, and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed upon us, to administer, as between certain individuals, the laws of the respective States, according to the best lights we possess of what those laws are. . . ."

The earlier federal decisions were collated, and the reasons for this rule were brilliantly stated, and applied to all courts, by Chief Justice WHEELER of the Supreme Court of Texas in *Smith* v. *Power,* 23 Tex. 29.

The only instance in which the Supreme Court of the United States has thought proper to review the decision of a Texas court of last resort in a suit involving title to, or boundaries of, a Mexican or Spanish grant of land formerly within the Mexican State of Tamaulipas, but now in Texas, was in *Sullivan* v. *Texas,* 207 U. S. 416; in which writ of error was granted on the only exception to the binding effect of the construction given by a State Supreme Court to a statute of its state; that where the federal court construes a contract of the State, it will interpret the contract for itself, though it may have been created by, or pursuant to, a statute of the State. The Supreme Court, after granting the writ, affirmed the judgment of the Texas Court of Civil Appeals: *Sullivan* v. *State,* 41 Tex. Civ. App. 89.

In construing the Texas statute of February 10, 1852, confirming title to numerous Tamaulipas grants, including the Balli title to Padre Island, and in determining the character of that title, under the laws in effect when the grant was made, the Supreme Court of Texas, in its opinion in the instant case, mentioned that Respondents' title was protected by the Treaty of Guadalupe Hidalgo. These references are now relied upon by the State, as raising a constitutional question for the consideration of the Supreme Court of the United States.

Since the State court held in favor of the rights claimed under the treaty, its ruling could not have created a constitutional question; aside from the self-evident proposition that the Supreme Court of Texas (and the Texas Court of Civil Appeals) arrived at the same conclusion on other satisfactory grounds. In *McKinney* v. *Saviego,* 18 How. (U. S.) 235, 240 the Supreme Court of the United States concluded that the Treaty of Guadalupe Hidalgo

> "Did not refer to any portion of the acknowledged limits of Texas;"

and in *Basse* v. *City of Brownsville,* 154 U. S. 610, in dismissing writ of error to Supreme Court of Texas in *City of Brownsville* v. *Basse & Hord,* 36 Tex. 461; the Supreme Court of the United States said:

> "In *McKinney* v. *Saviego,* 18 Howard, 240, it was decided that the Treaty of Hidalgo had no relation to property included within the State of Texas."

The land involved in the Brownsville suit was the townsite of that city, situated immediately upon the north bank of the Rio Grande, and formerly a part of the *ejidos,* or town commons, of the City of Matamoros, Tamaulipas, and the language used could be construed as a holding that the protection of the Treaty of Guadalupe Hidalgo did not extend to land within the present limits of Texas as one of the United States. (See notes U. S. Reports: *Basse* v. *Brownsville,* 154 U. S. 610.)

But as to titles to land between the Nueces and the Rio Grande, granted under the laws of Spain, or of the Mexican

State of Tamaulipas prior to December 19, 1836, the political authorities of Texas, as well as the Texas courts, have consistently taken a different view. On the political side, this appears from such Texas statutes as Act of February 8, 1850, Gammel's Laws, III—582; Act of February 10, 1852) Gammel's Laws, III—941, Paschal's Digest, Art. 4461; Act of February 11, 1854, Gammel's Laws, III—1533; Act of February 11, 1860, Gammel's Laws, IV—1471; Act of August 15, 1870, Gammel's Laws, VI—375; Section 8, Article XIV, Constitution of Texas, 1876; while as to all legitimate Tamaulipas titles originating prior to December 19, 1836, the courts of Texas have uniformly held that:

> "The claimant may rely upon his title under the laws of this State, including the Treaty of Guadalupe Hidalgo, which is binding as a law."

State v. *Sais,* 47 Tex. 307; *Clark* v. *Hills,* 67 Tex. 141; *Texas-Mexican Ry. Co.* v. *Locke,* 74 Tex. 370; *Haynes* v. *State,* 100 Tex. 426; *Cavazos* v. *Treviño,* 35 Tex. 133; *Corrigan* v. *State,* 42 Tex. Civ. App. 171 (Approved by the Supreme Court, 94 S. W. 101); *State* v. *Russell,* 38 Tex. Civ. App. 13 (Writ Refused); *State* v. *Gallardo,* 106 Tex. 274; *Kenedy Pasture Co.* v. *State,* 111 Tex. 200; *State* v. *Balli,* 190 S. W. 2d 71, 173 S. W. 2d 522.

In *Texas-Mexican Railway Co.* v. *Locke, supra,* the Supreme Court of Texas annulled Section 4, Article XIII, of the Texas Constitution of 1876, as being in conflict with the Treaty of Guadalupe Hidalgo, and, therefore, of Clause 2, Article VI, of the Constitution of the United States. And since the courts of Texas, as well as the Texas Legislature, have uniformly extended the protection of the Treaty of Guadalupe Hidalgo to lands ceded by the Mexican State of Tamaulipas by titles originating prior to December 19, 1836, no constitutional question is created by extending the protection of that treaty to the title here in suit; more especially since the same result is reached without regard to the treaty, on the sound and simple basis of Texas' obligations as a sovereign, and the honor and dignity of Texas, as a State.

Harris v. *O'Connor,* 185 S. W. 2d 993 (1014, 1016, 1018) (Writ of Error Refused, Want of Merit); *State* v. *Franco-American Securities,* 172 S. W. 2d 731 (Writ of Error Refused, Want of Merit); *Hilt* v. *Weber,* 252 Mich. 198.

Respondents' Point No. Two, Re-stated

It is the function of the Supreme Court of Texas to know and determine the laws under which lands were granted by a former sovereign within the present limits of Texas, and its holdings as to such laws are binding upon the Supreme Court of the United States.

In the language of Judge ROBERTS, of the Supreme Court of Texas, in *State* v. *Cuellar,* 47 Tex. 295, 305:

> ". . . It is the business of the courts of Texas to know and expound the laws pertaining to the rights to land situated in Texas, and here in suit, whether the laws, upon which the rights to the land depend, were laws made by the State of Texas, by the Republic of Texas, by the State of Tamaulipas as part of Mexico, or by Spain. . . ."

Under the uncontroverted proof in this record, the holding of the Supreme Court of Texas as to the validity of the Balli title presented no constitutional question, and was no more than a re-affirmance of well established rules. The Texas court concluded, as it was bound to conclude:

(1) The Balli title to "Padre Island" originated under the laws of the Mexican State of Tamaulipas, after September 7, 1821, the effective date of Mexican Independence; and before December 19, 1836. [R. 131-177]

State v. *Sais,* 47 Tex. 307; *State* v. *Gallardo,* 106 Tex. 274; *Haynes* v. *State,* 100 Tex. 426.

(2) Validity of the Balli "Padre Island" title is determined by the laws in effect in 1828 and 1829, when the grant was made, and the interpretation of those laws by the of-

ficers of government which made the grant; and the policy of those laws, and the correctness of the interpretation so given them, is no longer subject to review by our courts:

Barrow v. *Boyles,* 122 Tex. 416; *Bissell* v. *Haynes,* 9 Tex. 556; *Hanrick* v. *Jackson,* 55 Tex. 17; *Hardiman* v. *Herbert,* 11 Tex. 656; *Hatch* v. *Dunn,* 11 Tex. 708; *Ruiz* v. *Chambers,* 15 Tex. 586; *Groesbeck* v. *Golden,* 7 S. W. 362.

(3) A properly attested copy of the *expediente* of the Balli title, complete in all its parts, save for the absence of a "final concession," or "certificate of title," from the Governor of Tamaulipas; was filed for record December 31, 1847, in the office of the County Clerk of Nueces County, Texas, in which County the land was situated at that date; and this competent evidence of claim of title, supported by the claimants' possession, has been duly of record in Nueces County, since. [R. 412]

Sheldon v. *Milmo,* 90 Tex. 1; *Cavazos* v. *Treviño,* 6 Wall. 773; *Schunior* v. *Russell,* 83 Tex. 83; *Flores* v. *Hovel,* 125 S. W. 606; *Skov* v. *Coffin,* 137 S. W. 450; *Chapman* v. *Kellogg,* 252 S. W. 151.

(4) The title so recorded was supported at the trial by proof of compared and exemplified copies of this same *expediente,* from the municipal archives of Matamoros, Tamaulipas, the municipality in which the land in suit was situated at the date of the grant, and where the protocol of the *expediente* was properly deposited when the grant was made. [R. 131-177, 410-413]

State v. *Cardinas,* 47 Tex. 250, 286; *Texas-Mexican Ry. Co.* v. *Locke,* 74 Tex. 370; *Gonzales* v. *Ross,* 120 U. S. 605.

Paraphrasing the language of Chief Justice ROBERTS of the Supreme Court of Texas, in *State* v. *Cardinas,* 47 Tex. 250, 286; the *expediente* in evidence contains (save for the absence of the "final concession" as above noted)

> ". . . all of the requisites of a perfect title, under the laws . . . of that date . . ."

(5) Non-production of the "final concession" or "final certificate of title," is accounted for:

(a) By repeated findings by the Supreme Court of Texas:

Kenedy Pasture Co. v. *State,* 111 Tex. 200; *Haynes* v. *State,* 100 Tex. 426; *State* v. *Sais,* 60 Tex. 87.

that the State archives of Tamaulipas were destroyed by the French troops, at Victoria, Tamaulipas, in 1864; thus accounting for the non-existence of the protocols of certificates of title extended by the Governor of that State; and

(b) By the official reports of the Miller and Bourland Commission appointed by the State of Texas, in 1850, to investigate land titles in the area between the Nueces and the Rio Grande, that as to Padre Island, Nicolas and Juan Jose Balli "had obtained a title from the proper authorities;" and that all the original titles examined by the Commission in Cameron County had been lost by one of the commissioners "in the unfortunate wreck of the steamer *Anson*;" thus accounting for the non-production of the *testimonio* of the Balli grant. [R. 412-413]

(6) Without regard to, and assuming the total absence of such "final concession," or "certificate of title," the *expediente* in evidence established an adjudication to the Ballis of the island in suit; together with affirmative findings that the land had been selected and the island surveyed and its natural boundaries established in due course, and according to law; together with an express adjudication that all things necessary to be done by the Ballis had been done; and that, prior to December 19, 1836, and pending the issuance of a "final concession" or "certificate of title;" from the Governor of Tamaulipas, for which they were duly authorized to apply, and which the Governor was bound to extend to them, as a ministerial act, the Ballis had been placed in juridical possession of the island

as a whole. This was all that was necessary to evidence a cession of the island to the Ballis by "legitimate title," protected by the Treaty of Guadalupe Hidalgo, and the honor and fidelity of Texas as a State.

State v. *Sais,* 47 Tex. 307; *State* v. *Gallardo,* 106 Tex. 274; *Haynes* v. *State,* 100 Tex. 426; *State* v. *Russell,* 38 Tex. Civ. App. 13. (Writ Refused.)

(7) The Legislature of Texas, by express terms of the General Relinquishment Statute of February 10, 1852, recognized and confirmed the Balli title to Padre Island, and released and relinquished to those holding under it, all the right and interest of the State.

Clark v. *Hills,* 67 Tex. 141; *Reese* v. *Cobb,* 105 Tex. 399; *Downing* v. *Dias,* 80 Tex. 436; *Cavazos* v. *Treviño,* 35 Tex. 133; *Corrigan* v. *State,* 42 Tex. Civ. App. 171 (Writ Refused); *Sullivan* v. *Solis,* 52 Tex. Civ. App. 464; *United States* v. *Hancock,* 133 U. S. 193.

The Supreme Court of Texas also held, and was bound to hold:

(8) The grant from the State of Tamaulipas to Nicolas Balli and Juan Jose Balli was the grant of an island by name, which embraced all of the land, regardless of quantity, contained within its natural boundaries; and the proceedings evidenced by the *expediente* of the Tamaulipas title cannot be construed to hold that the State of Tamaulipas retained title for itself to any portion of the island, or intended so to do. [R. 131-177]

State v. *Gallardo,* 106 Tex. 274; *Heard* v. *Town of Refugio,* 129 Tex. 349; *Ford* v. *McRae,* 128 Tex. 106; *Town of Refugio* v. *Byrne,* 25 Tex. 193; *Arambula* v. *Sullivan,* 80 Tex. 615; *Lodge's Lessee* v. *Lee,* 6 Cranch. 237; *Veve y Diaz* v. *Sanchez,* 226 U. S. 234; *United States* v. *O'Donnell,* 303 U. S. 501; *Rutherford* v. *Tracy,* 48 Mo. 325; *Barksdale* v. *Barksdale,* 92 Miss. 166; *Stanley* v. *Green,* 12 Cal. 148; *Haley* v. *Amestoy,* 44 Cal. 132; *Truett* v. *Adams,* 66 Cal. 218.

(9) The cession of Padre Island to the Ballis by the Tamaulipas proceedings was a grant of the whole of an island

> "which lies between the sea and the Laguna Madre;" (Grant R. 152)

but the grantees were required, under the circumstances of that grant and the Tamaulipas General Law of Colonization of December 15, 1826, to pay only for the number of leagues of pasture land which it contained; it being the practice of the Mexican authorities (as well as our own) of that period to measure the price of ceded lands by the quantity of upland granted, and to make no charge for lowlands or lands otherwise considered worthless, though including them in the grant. (Section 23 *General Colonization Law of Tamaulipas,* December 15, 1826; Art. 89 Sayles *Early Laws of Texas* I—135; Gammel's *Laws of Texas* I—454)

Corrigan v. *State,* 42 Tex. Civ. App. 171; *Stover* v. *Gilbert,* 112 Tex. 429; *State* v. *Atlantic Oil Producing Co.,* 110 S. W. 2d 953 (Writ of Error Refused); *Walker* v. *Bailey,* 69 S. W. 2d 780; *Johns* v. *Schutz,* 47 Tex. 578; *State* v. *Texas Land & Cattle Co.,* 34 Tex. Civ. App. 460; *State* v. *Indio Cattle Co.,* 154 S. W. 2d 308 (Writ Refused, Want of Merit); *Lodge's Lessee* v. *Lee,* 6 Cranch. 237; *United States* v. *O'Donnell,* 303 U. S. 501; *Oklahoma* v. *Texas,* 268 U. S. 252; *Hardin* v. *Jordan,* 140 U. S. 371; *St. Paul & Pacific Railroad Co.* v. *Schurmeir,* 7 Wall. 272; *Coburn* v. *San Mateo County,* 75 F. 520; *Thos. B. Bishop Co.* v. *Santa Barbara County,* 96 F. 2d 198; *Jones* v. *Martin,* 35 F. 348; *White* v. *Burnley,* 20 How. (U. S.) 235; *Hilt* v. *Weber,* 252 Mich. 198.

(10) Doubts, if any, as to the extent and boundaries of a Mexican grant are resolved by the Act of Juridical Possession; and, in this instance juridical possession of the whole of the island was duly extended to the Ballis: [R. 172-173]

State v. *Russell,* 38 Tex. Civ. App. 13 (Writ of Error Refused); *Corrigan* v. *State,* 42 Tex. Civ. App. 171 (Writ of Error Refused); *State* v. *Corrigan,* 94 S. W. 101; *State* v. *Palacios,* 150 S. W. 229 (Writ of Error Refused); *Malarin* v. *United States,* 1 Wall. 282; *Graham* v. *United States,* 4 Wall. 259; *United States* v. *Pico,* 5 Wall. 536; *More* v. *Steinbach,* 127 U. S. 70; *Ainsa* v. *United States,* 161 U. S. 208.

(11) Where the proceedings for a Spanish or Mexican title executed in conformity to then existing laws, described the ceded land by known and fixed boundaries, such boundaries have never been disturbed by our courts, though they usually contain a large excess in quantity above that called for in the grant.

White v. *Burnley,* 20 How. (U. S.) 235; *Maxey* v. *O'Connor,* 23 Tex. 234; *Smith* v. *Power,* 23 Tex. 29; *State* v. *Galveston City Co.,* 38 Tex. 12; *State* v. *DeLeon,* 64 Tex. 553; *State* v. *Texas Land & Cattle Co.,* 34 Tex. Civ. App. 460; *Corrigan* v. *State,* 42 Tex. Civ. App. 171 (Writ Refused); *State* v. *Corrigan,* 94 S. W. 101; *State* v. *Russell,* 38 Tex. Civ. App. 13 (Writ Refused); *State* v. *Palacios,* 150 S. W. 229 (Writ Refused); *State* v. *Indio Cattle Co.,* 154 S. W. 2d 308. (Writ Refused for Want of Merit.)

(12) The State's only real contention, however stated, was that proof was made that the island granted contains more *sitios* than were stated in its title; and that the courts should so reform the grant, or otherwise diminish it, as to confine the Balli title to the acreage mentioned in the grant. This is contrary to well established law:

Welder v. *Carroll,* 29 Tex. 317, 332; *Corrigan* v. *State,* 42 Tex. Civ. App. 171 (Writ Refused); *State* v. *Russell,* 38 Tex. Civ. App. 13 (Writ Refused); *State* v. *Palacios,* 150 S. W. 229 (Writ Refused); *State* v. *Indio Cattle Co.,* 154 S. W. 2d 308 (Writ Refused, Want of Merit); *State* v. *Texas Land & Cattle Co.,* 34 Tex. Civ. App. 460; *State* v. *Galveston City Co.,* 38 Tex. 12.

In such cases, in the language of Chief Justice Moore of the Texas Supreme Court, in *Welder* v. *Carroll, supra*:

> ". . . The question for determination is neither the locality nor quantity of land to which either of the parties securing these several grants may have been entitled, but what amount of land was in fact granted to them, and what are its boundaries and limits? . . ."

Respondents' Point No. Three, Re-stated

Title to land acquired by accretion, or alluvion, is a title acquired by the laws of the State in which the land is situated; which each State determines for itself.

In *St. Louis* v. *Rutz*, 138 U. S. 226, 242; the Supreme Court of the United States said:

> "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois. *Barney* v. *Keokuk,* 94 U. S. 324, 338; *St. Louis* v. *Myers,* 113 U. S. 566; *Packer* v. *Bird,* 137 U. S. 661. In *Barney* v. *Keokuk,* it is said, that if the States 'choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.' "

and *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 632; announces the general rule:

> "The established doctrine is invoked that the title to the soil under navigable waters within their territorial limits, and the extent of riparian rights, are governed by the laws of the several States, subject to the authority of Congress under the Constitution of the United States. Martin *v.* Waddell, 16 Pet. 367; Pollard *v.* Hagan, 3 How. 212; Weber *v.* Harbor Commissioners, 18 Wall. 57; Barney *v.* Keokuk, 94 U. S. 324, 338; Packer

v. Bird, 137 U. S. 661, 669; St. Louis *v.* Rutz, 138 U. S. 226, 242; Hardin *v.* Jordan, 140 U. S. 371, 382, 402; Illinois Central R. R. Co. *v.* Illinois, 146 U. S. 387, 435, 452; Shively *v.* Bowlby, 152 U. S. 1, 40-47; Water Power Co. *v.* Water Commissioners, 168 U. S. 349, 365. . . ."

Respondents' Point No. Four, Re-stated

Where no question of the validity of a State statute under the Federal Constitution is presented, the federal courts are bound to follow the decisions of the highest court of a State upon questions relating to the State Constitution and its application to the laws of the State.

Among the recent cases supporting this proposition are:

Schuylkill Trust Company v. *Commonwealth of Pennsylvania,* 302 U. S. 506, 512, wherein the Court stated, at p. 512:

> "*Second.* The contention that the State courts really have not construed the act but have themselves amended it, and that this is judicial legislation forbidden by the constitution of Pennsylvania, is not open here. As the trial court pointed out, courts, in applying a statute, general and sweeping in its terms, may construe it as not intended to reach subjects which, by reason of constitutional prohibition, the legislature is without power to touch. Whether the courts of the Commonwealth exceeded their powers under the state constitution is not a federal question. We accept their construction of the act."

Senn v. *Tile Layers Protective Union,* 301 U. S. 468, 477, wherein it was stated, at p. 477:

> "*Second.* The hearings below were concerned mainly with questions of state law. Senn insisted there that the statute was no defense, because the controversy was not a 'labor dispute' within the meaning of Sec. 103.62. The courts ruled that the controversy was a 'labor dispute'; and that the acts done by the defendant

> were among those declared 'lawful' by Sec. 103.53. See also *American Furniture Co.* v. *Chauffeurs, Teamsters and Helpers Union,* 222 Wis. 338, 268, N. W. 250. Those issues involved the construction and application of the statute and the Constitution of the State. As to them the judgment of its highest court is conclusive."

Atchison, T. & S. F. R. Co. v. *Railroad Co.,* 283 U. S. 380, 390, 391, wherein it was stated at pp. 390, 391 that:

> ". . . The decision of the state court is conclusive so far as the constitution and laws of the State are concerned. . . ."

Swiss Oil Corp'n v. *Shanks,* 273 U. S. 407, wherein it was stated, at pp. 411, 412:

> "As the case is brought here from a state court, the construction put by the court below upon the statutes and constitution of its own state is not open to review here. Southwestern Oil Co. *v.* Texas, 217 U. S. 114, 119; Brown-Forman Co. *v.* Kentucky, 217 U. S. 563, 569. Since the Kentucky court of appeals has held that the plaintiff is not entitled under the state law to the relief prayed even if the Act of 1918 be deemed invalid, no question as to the validity of that act under the Federal Constitution is presented for decision on this record."

To the same effect are: *Thornton* v. *Duffy,* 254 U. S. 361; *Bi-Metallic Investment Co.* v. *State Board of Equalization of Colorado,* 239 U. S. 441; *White* v. *Leovy,* 174 U. S. 91; *Marchant, Admnx.* v. *Pennsylvania Railroad Company,* 153 U. S. 380.

This rule and the cited cases effectively dispose of Petitioner's contention (Petitioner's Application and Brief, pp. 9, 61-71) that the Texas courts' construction of Section 8, Article XIV, of the Constitution of Texas; or of the Texas General Relinquishment Act of February 10, 1852, create federal questions cognizable by the Supreme Court of the United States.

Respondents' Point No. Five, Re-stated

The Supreme Court of Texas decided every question presented in strict accord with the applicable decisions of the Supreme Court of the United States.

1. Extent and Boundaries of Padre Island Grant to Nicolas and Juan Jose Balli.

Since the Balli title to Padre Island was specifically confirmed by the Texas Relinquishment Statute of February 10, 1852, there can be no reasonable difference of opinion as to the right action of the Supreme Court of Texas in upholding the validity of the grant.

Petitioner argues, however, that the grant was not of the whole of the island; and should have been limited to eleven and a half leagues; and that alluvion forming on the island after 1828 did not become the property of its owners, but accrued to the benefit of the State. (Petitioner's Brief, pp. 27, 33-43)

It is sufficient reply to these contentions that the Supreme Court of Texas decided against them, and that its decision is final and binding on all other courts.

It is not difficult to show, however, that the holdings of the Texas court are in strict accord with the decisions of the Supreme Court of the United States. Thus, as to the Texas court's determination that confirmation of the Balli title by the Legislature of Texas extended to the full limits of the Tamaulipas grant, many analogous cases by the Supreme Court of the United States are to the same effect:

United States v. *Hancock,* 133 U. S. 193; *United States* v. *Maxwell Land Grant Co.,* 122 U. S. 365; *Russell* v. *Maxwell Land Grant Co.,* 158 U. S. 253; *Gonzalez* v. *Ross,* 120 U. S. 605; *Langdeau* v. *Hanes,* 21 Wall. 521; *Airhart* v. *Massieu,* 98 U. S. 491; *Morrow* v. *Whitney,* 95 U. S. 551; *Ryan* v. *Carter,* 93 U. S. 78; *Lanfear* v. *Hunley,* 4 Wall. 204; *Robinson* v. *Minor,* 10 How. (U. S.) 627; *Tameling* v. *U. S. Freehold & Em. Co.,* 93 U. S. 644.

Petitioner's contrary argument springs from three dissenting opinions by judges of the Supreme Court of Texas, the effect of which is that the State should have sued to establish De la Fuente's boundaries, rather than attack Respondents' valid grant. This is a matter of local law, as to which the Supreme Court of the United States will not inquire. But had the State sued to recover a portion, only, of the island on the basis of De la Fuente's measurements, this would have been a very different case.

The gravamen of the State's contention is that whereas the Ballis applied for the island in December, 1827, as containing 19½ *sitios* [square leagues]; no doubt on the basis of an early Spanish Survey, De la Fuente, the official Tamaulipas surveyor, measured it for 11.15 *sitios* in February and March, 1828; and whereas, the Miller and Bourland Commission, in 1850, recommended the Balli grant for approval as containing eleven and one-half square leagues; they then believed that the true area of the island was more than thirty square leagues. It contained 30½ leagues, as surveyed by Boyles in 1941.

These seeming discrepancies could have been readily explained. Padre Island has been surveyed and re-surveyed by the United States Coast and Geodetic Survey, along the line of mean high tide, at intervals since the annexation of Texas; and the reports and maps of such surveys are official documents of which the courts might take judicial notice; and are, if that were necessary, susceptible of easy proof. These U. S. Geodetic surveys indicate that the Ballis were remarkably accurate when, in 1827, they estimated the island as containing 19½ *sitios;* and that Miller and Bourland's 30-league estimate, in 1850, was at least ten leagues too large. They also show that the island increased in area but little during the nineteenth century; and that ten or more of its 30½ square leagues have resulted from accretions since 1904.

As for the difference between Balli's 1827 estimate of 19½ square leagues and De la Fuente's measurement of 11.15 *sitios* in 1828; De la Fuente's varas were, as a matter of law, longer than those used by Boyles, and by the early Spanish surveyors; and his area measurements were, in consequence, in larger square leagues. The unit of land measurement for this area as prescribed by the Spanish law was the *Vara de Burgos,* or Castilian vara, equivalent to 33.36 English inches; reduced in Texas at an early date, to 33⅓ inches, for convenience in calculating surveys.

But the Mexican Imperial Colonization Law of January 15, 1823 (Sayles' Early Laws of Texas, Art. 31, Vol. I, pp. 42-46, Secs. 5 and 7; Gammel's Laws of Texas, I—28) prescribed a standard Mexican vara of "*tres pies geométricos,*" or three geometrical feet. This was also the vara prescribed for the Mexican State of Tamaulipas, by Article 14 of its General Colonization Law of December 15, 1826; (Sayles' Early Laws of Texas, I—133, Art. 89; Gammel's Laws of Texas, I—454) and continued to be the unit of land measurement in Tamaulipas until a shorter vara was established by a decree of the dictatorial central government of Mexico, June 1, 1839.

Galvan: Ordenanzas de Tierras y Aguas (Mexico, 1844), pp. 56, 57, 62; *United States* v. *Perot,* 98 U. S. 428.

Spanish lexicons agree that the *pié geométrico* was to the *pié de Burgos* as 1,000 is to 923. (A New Pronouncing Dictionary of the Spanish and English Languages, Velasquez de la Cadena; New York and London, 1852, 1900; *Diccionario de la Lengua Castellano por la Academia Española,* (Madrid, 1823 and 1869); *Diccionario de la Lengua Española, Real Academia, Española* (Madrid, 1925).

De la Fuente surveyed with a *cordel* of fifty varas, measured according to the official measure, sealed with the Mexican Seal as required by the State of Tamaulipas. [R. 142.] He must be presumed to have meant the 36-inch vara prescribed by Tamaulipas law. His *sitios* were oversize, proportionately, as compared with the Spanish *sitio,* measured by the *vara de Burgos,* or with square leagues measured by the 33⅓-inch vara used by Boyles in 1941.

The same result is otherwise attained, as a matter of law, in a simpler way. In Texas, as elsewhere, it is an established rule that where there is a conflict between the call in a grant for distance and quantity, and calls for natural or artificial objects, the former must yield to the latter in the absence of extrinsic evidence showing a contrary intent.

John Hancock Mut. Life Ins. Co. v. *Faries,* 112 S. W. 2d 500; *Buford* v. *Gray,* 51 Tex. 331; *Luckett* v. *Scruggs,* 73

Tex. 519; *Thatcher* v. *Matthews,* 101 Tex. 122; *Mosley* v. *Edds,* 80 S. W. 2d 401; *Krider* v. *Wintermann,* 108 S. W. 2d 452.

De la Fuente's field notes and *Plan Demonstrativo* show that he did not measure the circumference of Padre Island. He ran, instead, a base line along its Gulf shore and approximated the Laguna shore line by running transverses at intervals, usually of 10,000 varas, perpendicular to his base line. He notes seventeen of these transverses, fifteen of which called to run from the Gulf to the shores of the Laguna. His two most southerly transverses had no Laguna call. He mapped his Laguna shore line by connecting his terminal calls at the northerly and southerly ends of the island, and the Laguna ends of his seventeen transverses, with imaginary lines. Since he, and Boyles, who surveyed the Island for Texas in 1940, both ran the Gulf shore of the island, his call for that line in varas, and Boyles' call for the same line, (if using the same vara) should have been substantially the same. De la Fuente's vara call for this line is materially less than that of Boyles'. Since the terminal calls for this Gulf shore line are natural objects, De la Fuente's vara call must, as a matter of law, be so extended that his vara call and that of Boyles, will coincide. And when De la Fuente's transverses are located and proportionately extended on this same vara basis, and their calls for the shore of the Laguna given effect, the discrepancy becomes negligible, or disappears. De la Fuente chained the Gulf shore of the island with a *rawhide* cordel, while Boyles, of course, used a steel chain. De la Fuente notes that he corrected his *cordel* on frequent occasions; but much of his chaining must, nevertheless, have been done with a lengthened cord. (Boyles' testimony: Record 120-121.)

Correct understanding of the Texas court's opinion may be had from direct application of well established legal principles to undisputed facts:

United States v. *Sutherland,* 19 How. (U. S.) 363; *State* v. *Bruni,* 37 Tex. Civ. App. 2 (Writ Refused); *Von Rosenberg* v. *Haynes,* 85 Tex. 357.

2. Law of Maritime Alluvion Applicable to Tamaulipas-Texas Grants.

The Supreme Court of the United States has left no doubt as to its view that maritime accretions, and river bank alluvion, are governed by the same rules of law.

Banks v. *Ogden,* 2 Wall. 57; *County of St. Clair* v. *Lovingston,* 23 Wall. 46; *Shively* v. *Bowlby,* 152 U. S. 1; *Stevens* v. *Arnold,* 262 U. S. 266.

It has implied that such is the law "which prevails in this country, whether of mixed antecedents or the common law." (*Ker* v. *Couden,* 223 U. S. 268, 279)

An Act of the Congress of the Republic of Texas, approved January 20, 1840, adopted the Common Law of England as the rule of decision in Texas (Gammel's Laws of Texas, II—177); and the English Common Law is always controlling in Texas, if not changed by statute, or unless it impinges on vested rights. The Texas Act of 1840 repealed all laws in force in the Republic of Texas prior to September 1, 1836,

> "Except such laws as relate exclusively to grants, and the colonization of lands in the State of Coahuila and Texas, and also such laws as relate to the reservation of Islands and Lands, and also of Salt Lakes, Licks, and Salt Springs, Mines, and Minerals of every description, made by the General and State Governments."

Laws of the Mexican State of Tamaulipas, except as they were within the general exception as to reservations, were not among those preserved.

The State's contention that alluvion formed since 1829 on Padre Island, does not become the property of its owners, in accordance with the rule of the Common Law, pre-supposes

> (1) That under the law in effect in 1829, in Tamaulipas, when the island was granted, alluvion forming afterward on the shores of the island did not become the property of the owners of the island; but that title thereto remained in the proprietary sovereign; that is, in the State.

(2) That Texas, as sovereign, could not, or did not, relinquish its right to such maritime alluvion, either by adopting the Common Law of England as its rule of decision; or by relinquishing its rights in the island, under the terms of the General Confirmation Statute of 1852.

The Supreme Court of Texas, having decided the first proposition adversely to the State's contention, did not find it necessary to consider the second. Since this is a matter of local law, on which a decision of Texas' highest court is conclusive and final, it is perhaps unimportant that a decision on the second contention must have produced the same result.

But it is plain that Petitioner is as wholly mistaken as to the second proposition, as it is as to the first. Its error arises from a misapplication of decisions, right in themselves:

Manry v. *Robison,* 122 Tex. 213, 221; *Miller* v. *Letzerich,* 121 Tex. 248; *State* v. *Grubstake Investment Association,* 117 Tex. 53. The Supreme Court of Texas, in *Manry* v. *Robison, supra,* in terms, said:

> "The rule is an elementary one that in determining the *rights of holders of title under Mexican grants,* the laws of Mexico in effect when the grants were made control."

This is settled law when applied, as intended, to the *rights of holders under the grants.* Such rights cannot be diminished without impairing vested rights. The State's thesis here is that *neither can they be increased.*

Such an argument is, of course, without merit. In the language of the Supreme Court of the United States in *Barney* v. *Keokuk,* 94 U. S. 324; if the states

> "choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

In other words, a sovereign state may cede its incidental rights as sovereign proprietor, if it chooses so to do. When the Republic of Texas, in 1840, elected to adopt the Common Law of England as the rule of decision in Texas, without reservation as to the laws under which grants were made by the State of Tamaulipas in the area between the Nueces and the Rio Grande, claimed by Texas after December 19, 1836; it released to Tamaulipas grantees, or their successors in title, all rights which Texas, as the succeeding sovereign, might have claimed under former laws of Tamaulipas, which were derogatory to the Common Law. This did not affect the rights of the grantees and their successors in title under Tamaulipas laws. Specifically, the State contends that under the laws of Tamaulipas, effective when Padre Island was granted, the grantees and their successors would have lost by erosion such portions of Padre Island as the winds and tides might take away, without any compensating advantage of gain by accretion, should the winds and tides add to their grant. The only effect of adopting the Common Law was to equalize the risk of loss and the right to gain; and the State of Texas cannot complain that it was to the State's disadvantage that the Republic of Texas should have chosen the more equitable rule; and the State is estopped by its own action in relinquishing to the grantees all its rights in Padre Island by the terms of the Act of February 10, 1852.

American decisions construing laws of "mixed antecedents,"—lands granted under the laws of Spain, or Mexico, followed by local adoption of the English Common Law,—have uniformly applied the Spanish Law of the Seashore, as if in substantial accord with Common Law rules:

Borax Consolidated Ltd. v. *City of Los Angeles,* 296 U. S. 10; *Shively* v. *Bowlby,* 152 U. S. 1; *United States* v. *Pacheco,* 2 Wall. 587; *City of Oakland* v. *Buteau,* 180 Cal. 83; *F. A. Hihn Co.* v. *City of Santa Cruz,* 170 Cal. 436; *Brickell* v. *Trammell, Governor,* 77 Fla. 544; *Apalachicola Land & Development Co.* v. *McRae,* 86 Fla. 393; *Thos. B. Bishop Co.* v. *Santa Barbara County,* 96 F. 2d 198; *Coburn* v. *San Mateo County,* 75 F. 520; *Jones* v. *Martin,* 35 F. 348.

On the direct question here considered, the ownership of alluvion formed on Spanish law grants, there appear to have been but two adjudications; one by the Texas Court of Civil Appeals:

State v. *Texas Land & Cattle Co.,* 34 Tex. Civ. App. 460; in which no Writ of Error was sought by the State; and the other by the Supreme Court of California:

Strand Improvement Co. v. *City of Long Beach,* 173 Cal. 765, 770, 773.

Both Texas and California Courts applied to laws of "mixed antecedents" the common law rule as declared by the Supreme Court of the United States.

A more complete development of this proposition appears in Appendix "A" hereto, pages 29 to 48 inclusive.

3. Petitioner's Claim of Forfeiture under Section 8, Article XIV, Texas Constitution of 1876.

(Petitioner's Brief, pp. 60-75)

Having confirmed the Tamaulipas grant of Padre Island by the Act of February 10, 1852, the State of Texas could not thereafter forfeit or destroy the vested Balli title, whether by legislative enactment in 1870, or by constitutional provision in 1876. This was the effect of the leading Texas case of *State* v. *Sais,* 47 Tex. 307, 313-314; followed uniformly since.

Survey and field notes, though required by the Act of Confirmation, have never been held a prerequisite of title, where the grant confirmed can be otherwise identified. This is true both under the laws of Texas;

Clark v. *Hills,* 67 Tex. 141; *Byrne* v. *Fagan,* 16 Tex. 391; *Sullivan* v. *State,* 41 Tex. Civ. App. 89; *Corrigan* v. *State,* 42 Tex. Civ. App. 171; 94 S. W. 101; *State* v. *Gallardo,* 106 Tex. 274; *State* v. *Sarnes,* 47 Tex. 323; *Schaeffer* v. *Berry,* 62 Tex. 705; *McLellan* v. *Brown,* 209 S. W. 177; *Land* v. *Dunn,* 241 S. W. 580;

and by decision of the Supreme Court of the United States;

Langdeau v. *Hanes,* 21 Wall. 521; *Morrow* v. *Whitney,* 95 U. S. 551.

Since the construction of Section 8, Article XIV, of the Constitution of Texas, is a matter to be determined by the Supreme Court of Texas, its discussion here is pretermitted; but since Petitioner has sought to engraft it with a Federal Question, the point is presented in Appendix "B" hereto, pages 49 to 52 inclusive.

Writ of Certiorari Should Be Denied

This may well be the first and only instance where a State, suing as sovereign proprietor in its own courts, has refused to abide by the decision of its own highest tribunal, or has sought, on alleged "constitutional" grounds, to overturn a solemn judgment of its own Supreme Court.

Since the manifest purpose of each of the cited provisions of the Federal Constitution, and of the protective portion of the Treaty of Guadalupe Hidalgo, is to protect the rights of individual owners against arbitrary conduct by the State, it may be that no federal question can ever arise, where the constitutional protection claimed by the individual citizen is sustained by the holding of the State court. But it is certain that if a constitutional question could arise in a case of that nature, it can not be in a case where the only questions decided by the Supreme Court of Texas had to do with the title and boundaries of a grant of land situated in Texas; construction of an Act of the Legislature of Texas confirming that title; and the proper interpretation to be accorded a provision of the Constitution of the State; each of which questions it resolved favorably to the rights claimed, and against the contentions urged by the State.

Respondents respectfully submit that the application for writ of certiorari is without merit, and should be denied.

Dated: New York, N. Y., May 16, 1946.

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APPENDIX "A"

The Law of Maritime Alluvion

The State of Texas, in the instant case, contended that under the Law of Maritime Alluvion effective in Tamaulipas at the date of the Balli Padre Island grant, accretions to the island forming after 1829 did not become the property of the owners, but inured to the benefit of the State. The Supreme Court of Texas over-ruled this contention, holding that the applicable law of Tamaulipas as to maritime alluvion was in substantial accord with the Common Law. *Its construction of the law of Tamaulipas is conclusive, as applied to land situated in Texas, and binding on other courts.*

This conclusion is well supported by the decisions of the Supreme Court of the United States, and on the basis of the ancient Roman Law.

In *County of St. Clair* v. *Lovingston,* 23 Wallace 46, 66-69; Mr. Justice Swayne, for the Supreme Court of the United States, said:

> "Blackstone thus lays down the rule of the common law:
>
> " '*And as to lands gained from the sea, either by alluvion, by the washing up of land and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining.* For *de minimis non curat lex;* and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, *this possible gain is, therefore, a reciprocal consideration for such possible charge or loss.* But if the alluvion be sudden or considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable that he should have the soil when the water has left it dry.' 2 Com. 262; see, also, Woolwich's Law of Waters, 34; and Shultes, Aquatic Rights, 116."

* * * * *

> "*In England, the rule which is applied to gradual accretions on the shores of fresh waters is applied also to such accretions on the shores of the sea.* King *v.* Yarborough, 3 Dow & C. App. Cas. 178."

In support of these conclusions, Mr. Justice **Swayne** said:

> "In the Institutes of Justinian, it is said: '*Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase, and that is added by alluvion which is added so gradually that no one can perceive how much is added at any one moment of time.*' Lib. II, tit. 1., sec. 20."

and

> "In the light of the authorities *alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous.* It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. *The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature.* It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. *The right is a natural, not a civil one.* The maxim '*qui sentit onus debet sentire commodum*' lies at its foundation. *The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his.* The principle applies alike to streams that do, and to those that do not overflow their banks, and where dikes and other defences are, and where they are not, necessary to keep the water within its proper limits. 3 Wash. R. Prop. 48; Munic. No. 2 *v.* Orleans Cotton Press, 18 La. 122."

This was the rule applied universally, until after the adoption of the French Civil Code, or "Code Napoleon," in 1804. In the various countries inheriting the Roman Law, it was held:

(1) In England:

In *Rex* v. *Yarborough,* 2 Bligh, N. R. 147, 158, 160, 161; cited by Mr. Justice Swayne, the House of Lords, highest British authority, declared:

> ". . . We think there is a custom by which lands from which the sea is gradually and imperceptibly removed by the alluvion of soil becomes the property of the person to whose land it is attached, although it has been the *fundus maris,* and as such the property of the king. Such a custom is reasonable as regards the rights of the king, and the subjects claiming under it, beneficial to the public, and its existence is established by satisfactory legal evidence.
>
> . . . . .
>
> ". . . The existence of this custom is established by legal evidence. In Bracton (Book 2, cap. 2), there is this passage: *'Item quod per alluvionem agro tuo flumen adjecit jure gentium tibi acquiritur: est autem alluvio latens incrementum et per alluvionem adjici dicitur quod ita paulatim adjicitus quod intelligere non posses quo momento temporis adjiciatur. Si autem non sit latens incrementum, imo apparens contrarium erit.'*
>
> "In a treatise, which is published as the work of Lord Hale [referring to De Jure Maris] treating of this passage, it is said that: 'Bracton follows in this the civil law writers, and yet, even according to this, the common law doth regularly hold between parties; but it is doubtful in case of an arm of the sea.' It is true that Bracton follows the civil law, for the passage above quoted is to be found in the same words in the Institute (Lib. 2, tit. i, s. 18), but Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as part of those laws and customs.

> Lord Hale admits, that it is the law of England in cases between subject and subject; and it would be difficult to find a reason why this same question between the Crown and a subject, should not be decided by the same rule. Bracton wrote on the law of England, and the situation that he filled, namely, that of Chief Justice, in the reign of Henry 3, gives great authority to his writings. Lord Hale, in his History of the common law (Cap. 7) says that it was much improved in the time of Bracton. This improvement was made, by incorporating much of the civil law into the common law. . . . But the authority of Bracton has been confirmed by modern writers, and by all the decided cases that are to be found in the books. The same doctrine that Bracton lays down, is to be found in Rolle's Abridgement (Tit. Prerogative, En le Mere, page 168 and seq., pl. 3, 9, 12), in Comyn's Digest (Tit. Prerogative, D. 62), in Calle's (Broderip's Edition, page 62), and in Blackstone's Commentaries (Vol. 2, page 262.)"

Later (in 1878) this question was carefully re-examined in England in the case of *Foster* v. *Wright,* 4 Common Pleas Div. 438, 446-448; where Judge LINDLEY, for the High Court of Justice, perfected the decision in *Rex* v. *Yarborough,* saying:

> "Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex* v. *Yarborough* (3 B. & C. 91); and, conversely, land gradually incroached upon by water, ceases to belong to the former owner: *In Re Hull and Selby Ry. Co.* (5 M & W 327). The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shows this to be the case. Our own law may be traced back through Blackstone, Hale, Britton, Fleta, and Bracton, to the Institutes of Justinian, from which Bracton evidently took his exposition of the subject. . . .
>
> "Upon such a question as this *I am wholly unable to see any difference between tidal and non-tidal*

> *or navigable or non-navigable rivers:* and Lord Hale himself says *there is no difference in this respect between the sea and its arms and other waters: De Jure Maris,* p. 6. The question does not depend on any doctrine peculiar to the Royal prerogative, but on the more general reasons to which I have alluded above. . . .''

Lord HALE's *De Jure Maris,* cited in the leading English,cases said:

> ''Second, in this case *it was by increment of time and by material thrown up by the sea.* It is not a sudden reliction or recession of the sea. . . . *It is an acquest by projection or alluvion, not by recession or reliction.*
>
> Third. That such an acquisition lies in custom and prescription; and that it hath a reasonable intendment because these secret and gradual increases of the land adjoining *cedant sole tamquam majus principali;* and so by custom it becomes as a prerequisite to the land *as it doth in all cases of this nature by the civil law.''*

(2) IN THE UNITED STATES:

In *Banks* v. *Ogden,* 2 Wall. 57, 67; the United States Supreme Court, speaking through Mr. Justice CHASE, said:

> ''*The rule governing additions made to land, bounded by a river, lake or sea,* has been much discussed and variously settled by usage and by positive law. *Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land, thus bounded, is entitled to these additions.* By some, the rule has been vindicated *on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion;* by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient, that insensible additions to the shore should follow the title to the shore itself.

> "*There is no question in this case that the accretion from Lake Michigan belongs to the proprietor of land bounded by the lake. . . .*"

Which was followed, chronologically, by Mr. Justice SWAYNE'S careful exposition of the Law of Alluvion in *County of St. Clair* v. *Lovingston,* 23 Wall. 46; quoted above, and by Judge GRAY'S scholarly opinion in *Shively* v. *Bowlby,* 152 U. S. 1, 35, 36; where it is said:

> "*The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters,* and to the King or the State as to private persons; *and is independent of the law governing the title in the soil covered by the water.*
>
> *Lord Hale,* in *Hargrave's Law Tracts,* 5, 14, 28; *Rex.* v. *Yarborough,* in the King's Bench, 3 B. & C. 91, and 4 D. & R. 790, and in the House of Lords, 1 Dow. & C. 178, 2 Bligh, N. R. 147, and 5 Bing. 163; *Doe* v. *East India Co.,* 10 Moore, P. C. 140; *Foster* v. *Wright,* L. R. 4 C. P. Div. 438; *Handly* v. *Anthony,* 5 Wheat. 374, 380; *Jefferies* v. *East Omaha Co.,* 134 U. S. 178, 189-193; *Nebraska* v. *Iowa,* 143 U. S. 359; *Minto* v. *Delaney,* 7 Or. 337."

Stevens v. *Arnold,* 262 U. S. 266, 270; involved title to a tract of land in Atlantic City, New Jersey, which had once been part of a lot belonging to complainant; had been lost to him by tidal erosion, and, while under water, granted to the defendant by the State of New Jersey, but which, after the issuance of the State's patent, had been physically restored by accretion, to the lot of which it had originally belonged. A New Jersey decree, undertaking to adjust this apparent conflict in titles, began by saying:

> " '. . . if the land was formerly fast land, (as this was said to have been) and the title was lost by erosion, it became the property of the State, *not merely as*

> *long as it remained under water, but, if the State made a riparian grant, absolutely. . . .' "*

but added:

> " '. . . The title lost by erosion was then lost forever, *unless it was regained by accretion, and the right of accretion was the compensation of the former owner for his loss. . . .' "*

and Mr. Justice Holmes, in resolving this ambiguous holding, said:

> ". . . We presume from this language that in New Jersey *as elsewhere by the common law the right of accretion is not like the permissive right to use land still under water, but is a right as against the State as well as its grantees, when as here the grantees have not filled in the land.* In some countries that inherit the Roman law the rule may be different. *Ker & Co.* v. *Couden,* 223 U. S. 268.
>
> We conclude that the conveyance by the State did not give the defendant a title to land added by accretion to the complainants' premises, and that it does not matter that this conveyance was by metes and bounds. *The boundaries however indicated were good until changed by the gradual work of the ocean and then were modified in accordance with what we believe to be the common law.* Banks *v.* Ogden, 2 Wall. 57."

(3) In Holland:

No other country has had more experience with maritime alluvion than has Holland; nor a commentator whose conclusions have commanded more universal respect.

Hugo Grotius, in his work on the *Jurisprudence of Holland,* Book 2, chapter 9, said:

> "According to the Roman Law, acquisition of ownership by casting up of soil is either immediate or mediate. It is immediate when silt accumulates against a man's land (alluvion), or when the bed of a stream is left dry. *Accumulation of silt or alluvion was also understood to take place when the river or sea added*

> *something imperceptibly to the land;* and what was so added belonged to the owners of the land where the alluvion occurred, each in proportion to the breadth of his land at the place."

(4) IN FRANCE:

Hall's American Law Journal, Vol. 2, pp. 307, *et seq.* (published in 1808) contains a study of the Law of Alluvion by Edward Livingston, of Louisiana, which collates the leading French authorities who had written on the Law of Alluvion in that country prior to the promulgation of the Code Napoleon in 1804. Livingston noted that Guyot, in his *Repertoire Universelle,* published in 1784, defines alluvion:

> "*Alluvion:* Increase of land which is made little by little on the borders of the *sea,* of *streams and of rivers* by lands which the water brings there. The Roman law places alluvion in the category of the means of acquiring property by the law of nations as being a species of accession; so that the accretion made imperceptibly becomes a part of the heritage to which it is found added. This is founded on the maxim which provides that the 'gain appertains to him who is exposed to suffer the damage.' "

And *Desinart,* on title Alluvion, Vol. I. p. 74, said:

> "1. Alluvion is an accretion which is made *imperceptibly, little by little, upon the borders of the sea, of streams and rivers, by lands which the water carries there.*
>
> "2. *When by alluvion an estate is imperceptibly increased, the increase belongs to the owner,* and he whose estate is decreased in this manner cannot recover what is wanting to him.
>
> "This is the maxim of the Roman law which is in effect in France except in Franche Compte."

And *LaVasle* is quoted as holding that

> "Alluvion is an increase of the ground which takes place by slow degrees, *on the shores of the sea,* on the

borders of streams and rivers; occasioned by the earth which the water conveys and which becomes so consolidated with the contiguous land that it forms a whole with it—an identity. The name of alluvion is also given to those lands which are slowly and imperceptibly left uncovered by the water.

"The Roman law places alluvions in the number of the means of acquiring according to the laws of nations, as being a kind of accession; that augmentation, being operated in a slow and imperceptible manner, remains to the inheritance, to which it is found united.

"The portion which is thus added insensibly is not considered as new land, it is a part of the old which becomes possessed of the same qualities, and it belongs to the same owner—in the same manner as the growth of a tree from parts of the tree—and is the property of the proprietor of the tree. The right of increase by alluvion is grounded in the maxim of right which bestows the profits, and the advantages of a thing, to him who is exposed to suffer its damages and its losses.

"*The alluvions which the sea produces on the land which it bathes, also belong, as a right of increase, to the proprietor of those inheritances, who may also make levees or dikes to secure them.*"

(5) IN SPAIN:

The English Common Law of alluvion, and the Spanish rule of *Las Siete Partidas,* on the same point, derive, alike, from the Institutes of Justinian, the ancient Roman Law. Alfonso the Wise of Castile promulgated the Spanish *Partidas* at the very period (1256-1263) when Bracton was incorporating the rule as stated by Justinian, into the English Common Law.

Book 2, Title 1, Section 20, of the Institutes, cited by Bracton, and followed in *Las Siete Partidas,* provided:

"Moreover the alluvial soil added by the river to your land becomes yours by the laws of nations. Alluvion is an imperceptible increase; and that is added by alluvion which is added so gradually that no one

> person can perceive how much is added at any moment of time."

This rule was carried forward into *Law 26, Title 28, Partida 3,* of *Las Siete Partidas,* which is in these terms:

> "For this reason we decree that everything that rivers take from men little by little so that the amount of it cannot be ascertained because it is not all removed at once shall belong to the owners of the land to which **it is united.**"

Since the rule of the English Common Law, and the Spanish rule of *Las Siete Partidas* both follow the quoted rule from Justinian; which mentions rivers, only, and does not refer, in terms, to accretions cast up by the sea; the only question that has arisen, or can arise, in this connection, is whether under the Spanish law, maritime accretions, like the alluvion of rivers, became, as under the Common Law, the property of the adjacent owner; when the identical rule from Justinian was applied to seashore grants in Spain.

Since there has never been, in Spain, or in the Spanish provinces in America, a body of judicial precedents, interpreting the law and recording its growth; there is, in Spanish jurisprudence, no background of adjudications to aid with difficult interpretations; and the only authorities available with regard to them are the opinions of learned law writers, called *juris consults,* whose conclusions and commentaries have been preserved. Most notable of these, and the one invariably followed by the Supreme Court of Texas, was Dr. Joaquin Escriche, who, in his *Diccionario de Legislacion y Jurisprudencia,* at p. 149, word *Alluvion,* said:

> "*The alluvium that the sea adds to properties situated on its shores, belongs also by the right of accession to the owners of said property, who are authorized to construct dikes in order to preserve it.*"

No Spanish authority is known and, for that matter, none is known from any jurisdiction, expressing a contrary view, which does not derive, directly, or by intermediate statute, from a radical departure from the rule of Justinian stemming from the "Code Napoleon," or French Civil Code. This was the first true code adopted anywhere; and it has profoundly influenced the legal systems of Spain, Italy, Holland, Mexico, and the States of Central and South America; and that of Louisiana, of the United States. These all tend to follow the Code Napoleon, where it departs from the Roman Law. On the point at issue, Section 556 of the French Civil Code provides:

> "The accumulation and increase of deposits formed successively and imperceptibly on soil bordering on a river or other stream is denominated alluvion, and that alluvion belongs to the proprietor of the bank."

and Section 557:

> "It is the same with relictions which running water forms when it retires insensibly from one of its banks and moves against the other. The proprietor of the bank that is uncovered profits by the alluvion, without the riparian owner on the opposite side being able to claim the land which he has lost. *This right has no place in regard to relictions of the sea.*"

This is the earliest known enunciation in any law, and the earliest statement of any rule, that the law of seashore alluvion differs from Justinian's rule as to alluvion of rivers, which is still applied in France. It represented a complete reversal of the law theretofore in effect in France; and sheds no light, of course, on the Spanish Law in effect in the Mexican State of Tamaulipas in 1829.

Notwithstanding the evident influence of the Code Napoleon on later codes of the Latin states, it was not invariably given effect. Thus, as regards Maritime Alluvion, Article 454 of the Italian Code, adopted in 1865, as translated into English, provides:

> "Art. 454.—The lands abandoned by the rivers belong, also by alluvion, to the owner of the uncovered shore, and the owner of the opposite shore has no claim to the land lost. This right does not apply as to land abandoned by the sea."

This is a literal translation of Article 557 of the French Civil Code. So is Article 510 of the Louisiana Civil Code. But Article 650 of the Civil Code of Chile, far from declaring maritime alluvion to be public property, is in close accord with our British and American common law rules. With Section 649, essential to its meaning, it translates:

> "Sec. 649.—The augment which the shore of the sea, or of a river or lake, receives from the slow and imperceptible withdrawal of the waters, is called alluvion.
>
> "Sec. 650.—The land of alluvion accedes to the riparian estates between their respective boundary lines prolonged directly to the water; but it will belong to the State in improved ports.
>
> "The land which the water covers and uncovers alternately in its periodical rise and fall, forms part of the shore or of the drainway, and does not accede to the contiguous estates so long as this condition continues."

The first civil code of the Mexican State of Tamaulipas was adopted in 1871. It is, in substance, the same code that was enacted by the Federal Government of Mexico, December 13, 1870, for the government of the Federal District of Mexico and the Territory of Lower California, under federal laws. On the point here considered, it was no more than a re-statement, in modern Spanish, of the archaic language of *Las Siete Partidas.* As translated by Hon. J. T. CANALES (of Respondents' Counsel) the Tamaulipas Code of 1871, Title III, Chapter 6, dealing with the Right of Accession, provides:

> "Art. 893: To the owners of estates bounded by the banks of rivers belong the increase which these estates receive slowly and insensibly by the effect of the current waters.
>
> "Art. 894: The owners of estates bounded by lakes or ponds do not acquire the land uncovered by the natural diminution of the waters, nor lose that which is inundated by extraordinary flows.

> "Art. 895: When the force of the river washes away a considerable and recognizable portion of riparian land and carries it towards another below, or to the opposite bank, the proprietor of the portion torn away may reclaim the property, doing so within two years, counting from the event, this term having passed, he will lose his right of ownership, unless the proprietor of the field to which the washed-away portion was united shall not have taken possession of the same.
>
> "Art. 896: If the force of the water washes away trees only, the proprietor of them preserves the right of reclaiming them and of carrying them to his estate in the same period of two years, but he cannot use the rights of proprietor of them in the field of another on which they are found.
>
> "Art. 897: When a river varies its course, the owners of the land, or estates newly covered with the waters, lose the space which the river occupies; and the riparian proprietor of the abandoned bed acquires the part which remains in front of his land to the middle of the bed or course of the river."

Two American decisions, and only two, are cited as holding that the rule of the Code Napoleon, was also the rule of the ancient Spanish law. These are:

Zeller v. *Southern Yacht Club,* 34 L. Ann. 837; by the Supreme Court of Louisiana; and *Ker* v. *Couden,* 223 U. S. 268, 279; by the Supreme Court of the United States. Both are cases construing statutes derived directly, or intermediately, from the French Civil Code.

As was pointed out by the Supreme Court of California in *Strand Improvement Co.* v. *City of Long Beach,* 173 Cal. 765, 770-773; the Louisiana opinion is not clear as to whether the land there in question was upland formed by accretion, or was land underlying the waters of Lake Pontchartrain, which had not risen above the level of tidal flow. In so far as it does relate to accretions, it applies the provisions of Article 510, of the Civil Code of Louisiana; transplanted, directly, from the Code Napoleon of 1804.

Ker v. *Couden, supra,* arose in the Philippine Islands, and, as was carefully stated by Mr. Justice HOLMES in his opinion, dealt only with

> ". . . the *law of the Philippines,* not with that which prevails in this country, *whether of mixed antecedents or the common law.*"

It was limited, in fact, to a local application of the Spanish Law of Waters of 1866. The land involved in that suit contained the United States Naval Base at Cavite; which had long been in the use and possession of the United States Government, and included improvements costing half a million dollars, which our Government had made. Prior to its acquisition by the United States, it had been similarly long used and occupied by the Government of Spain. The issues were so framed that the courts could not render judgment for the Government on its possessory title; and the law of alluvion had to be so applied as to arrive at the undoubted justice of the case. Each of the three courts which heard the case so applied it; but they gave very different reasons for the results reached.

The opinions of the two Philippine courts (the Court of First Instance of Cavite Province, and the Supreme Court of the Philippine Islands, *Ker* v. *Couden,* 6 Phil. R. 732) present, when carefully studied, an interesting history of the change in the rule as to Maritime Alluvion, in Spanish jurisprudence, under the influence of the Code Napoleon, after 1804.

Beginnings of a departure from the ancient rule of *Las Siete Partidas,* as interpreted by Escriche, toward the doctrine of the Code Napoleon, appear in 1849 in a comment by Arrazola:

> (*Enciclopedia Española, Derecho y Administracion,* Madrid, 1849, Volume 2, pp. 580-583;)

who said:

> "Nor does there exist any right of accretion with respect to the changes made by the sea which leave above water mark any piece of land adjoining the fields

> or the beach. *The French law has thought it proper to expressly decide this point in the manner above stated,* but it should be sufficient to remember that these lands are considered as appertaining to the public domain in order to so determine in all cases, even if there should be no final decision to that effect."

Arrazola's reference to the French law indicates that the writer knew no Spanish precedent; and proposed, or anticipated a Spanish application of the rule newly created by the French Code. It appears from the decisions of the Philippine courts in *Ker* v. *Couden, supra,* that the commission appointed to draft the Spanish Law of Waters of 1866, recommended: (Article 7, Commission's Report)

> "*That lands adjacent to the sea or to its shores should be entitled to profit by the rights of alluvion,* on the ground that the reasons of justice and convenience, upon which is based the right of alluvion granted to the owners of shore lands, are equally applicable to the case under discussion."

This would have continued in effect Escriche's understanding of the rule of the ancient law. But Article 4 of the Law of Waters of 1866, as actually adopted, modified this recommendation, in the direction of the rule of the Code Napoleon, since the new Spanish statute read:

> "Art. 4. Lands which attach themselves to the shores by accessions and deposits caused by the sea are of the public dominion. When the waters of the sea no longer bathe them and they are not necessary for purposes of public utility, nor for the establishment of special industries, nor of the service of the coast guard, *the Government will declare them the property of the owners of the adjacent estates in augmentation of these.*"

This was the statute construed in *Ker* v. *Couden, supra,* by Mr. Justice HOLMES. His caution in citing it in his later opinion in *Stevens* v. *Arnold, supra,* and his strict limitation of his *Ker* v. *Couden* opinion to Philippine local law, are conclusive that it could not apply, and that its author did not intend that it should apply, where the Spanish Law of Waters was not in the case.

> *State* v. *Texas Land & Cattle Co.,* 34 Tex. Civ. App. 460, 463;

was, until the publication of the Texas courts' opinions in the instant case, the only published opinion in a case affecting lands granted by the Mexican State of Tamaulipas, decided by any court of Texas or of the United States, which bore upon the exact question here. It was a suit by the State of Texas to recover *Los Laureles,* an unconfirmed Spanish grant situated on the shores of *Laguna Madre,* in Nueces County, Texas, opposite the northern end of Padre Island. It was granted for twelve leagues in 1807, but, as resurveyed in 1872, contained twenty-two. This excess was created, as was that of Padre Island, partly by accretion, and partly by the inclusion of more leagues than stated in the original grant. For this excess, by alternative plea, the State sued. In that case, as in this, recovery was denied by the Texas Court.

In answer to one of the State's contentions, that court said:

> "It is further contended by the State that it was entitled to recover the land built up on the eastern side of said peninsula since the date of the grant, because the extension had not been so gradual as to make it an accretion which would belong to the owner of the adjoining land. The law applicable to this question has been fully stated by this court in the case of *Denny* v. *Cotton,* 3 Tex. Civ. App., 634; and, applying the rules there laid down to the facts in the case, we think it clear that the lower court was authorized in concluding that such extension of the land as was shown belonged as an accretion to the adjoining owner."

Denny v. *Cotton,* 3 Tex. Civ. App. 634; cited in the Texas court's opinion, was based upon the opinion of the Supreme Court of the United States in *Nebraska* v. *Iowa,* 143 U. S. 359. These cases dealt with the alluvion of rivers; and their application to maritime alluvion in the Laureles case, is conclusive that the political authorities of Texas, as well as the courts, were convinced that the laws applicable to Spanish law grants and to seashore alluvion, were those which are applied to alluvial erosion and accretion, in Texas and throughout the United States.

The opinion of the Supreme Court of California, in *Strand Improvement Co.* v. *City of Long Beach, supra,* is of special interest in that it construed, in the light of that State's adoption of the common law, a California statute defining accretion, identical in substance, and almost so in verbiage, with the provisions of Law 26, Title 28, Partida 3; and Section 20, Book 2, Title 1, of the Institutes of Justinian, which declare, respectively, the law of alluvion in Spanish jurisprudence, and in that of Rome. The California court said:

> "The claim of the city to such accretions is based entirely on the proposition that the *law of this state is that land formed by alluvion along the shore of the sea does not belong to the owner of the adjoining upland, but remains the property of the state in virtue of its sovereignty,* as it was while the tides flowed over the space covered by the alluvion. The proposition considered in the light of its practical application and consequences, is certainly a most extraordinary one. California has more than 1,000 miles of seashore to which land is continually being added by alluvion, and from which land is continually being taken away by reliction. The actual line of mean high tide, as it existed when the State was formed, or as it was in 1872, when the Civil Code was enacted, has never been surveyed, and in places where relictions or alluvions have changed the shore line, the original line is unknown and cannot be ascertained with any degree of certainty. *If the doctrine is correct, the state is the real owner of innumerable parcels of land added to the shore by alluvion which hitherto have been supposed to belong to the respective owners of the upland to which they have been added* and the boundaries of which cannot now

be ascertained. *It is not difficult to see that great uncertainty, confusion, and much litigation would ensue if such doctrine were established and enforced.*

* * * * *

"The city relies on the application of the maxim, 'expressio unius exclusio est alterius,' to Section 1014 of the Civil Code. This section is as follows: 'Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.'

"*The argument is that since this section mentions the banks of a 'river or stream', and does not mention the seashore, it must be taken as abrogating the common law, so far as alluvion upon the seashore is concerned.* This theory would make an omission to say anything on a subject operate as an affirmative declaration repealing an existing law on the subject not mentioned. We do not think the rule of construction relied on should be carried so far in this case, if, indeed, it could be done in any case. The doctrine that the right to alluvion exists in the owner of the seashore, as well as elsewhere, has been recognized in our decisions. Dana *v.* Jackson, St. W. Co., 31 Cal. 118, 120, 89 Am. Dec. 164; Wright *v.* Seymour, 69 Cal. 122, 126, 10 Pac. 323. * * *

"Our conclusion is that the right of the upland owner to additions to his land by alluvion or accretions exists where the land abuts upon the ocean, and that Section 1014 of the Civil Code has no application to alter the common-law rule in that respect."

Directly on the Law of Maritime Alluvion, the California court said:

"* * * *The Act of April 13, 1850, declared that the common law of England shall be the rule of decision in this state, where it is not repugnant to the federal or state constitution, or to the statutes of the state.*

(Stats. 1850, c. 95, p. 219.) This provision is now a part of our Political Code. (Section 4468.) The law of alluvion is thus stated by Blackstone: '*And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimus non curat lex; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss.*' (2 Bl. Com, 262.) This is practically the universal rule. (3 Wash. Real Pro. (6th Ed.) Sec. 1884, p. 74; 1 Am. & Eng. Ency. of Law, 468; Camden, etc. Co. *v.* Lippincott, 45 N. J. Law, 405, 410; Mulry *v.* Norton, 100 N. Y. 424, 434, 3 N. E. 581, 53 Am. Rep. 206; Shively *v.* Bowlby, 152 U. S. 1, 35, 38 L. Ed. 331, 344, 14 S. Ct. 548; St. Clair County v. Lovingston, 90 U. S. (23 Wall.) 46, 57, 23 L. Ed. 59; Hagan *v.* Campbell, note, 33 Am. Dec. 277.) There is a statement of Chancellor Kent that land gained by accretion belongs, 'in the case of the sea or navigable rivers, to the sovereign, (3 Kent, Com. 428.) This is part of a passage defining the law of accretion. It is directly contrary to the cases cited by the author to support it. In a footnote to the fourteenth edition, Mr. Gould, the annotator, cites Zeller *v.* Southern Yacht Club, 34 La. Ann. 837, as sustaining the doctrine. The opinion in that case is not clear on the question whether the land in controversy was upland made by accretion, or was land under the waters of Lake Pontchartrain. *So far as it refers to the right to accretions, it appears to be based on the authority of article 510 of the Louisiana Civil Code*, which it gives as declaring that the right of the upland owner to land left dry by derelictions 'does not take place in case of derelictions of the sea.' *That state has not, so far as we are aware, adopted the common law. The case is, therefore, not in point here. It is contrary to all common-law authority.*"

The applicable law has never been better stated than by Mr. Justice McKenna, dissenting in *Ker* v. *Couden, supra,* in preserving and stating the general rule:

> "* * * I think the better deduction from them (the authorities cited) is that they only declare *the constant integrity of the shore, and the dominion of the government over it whether it recede or advance. When it ceases to be washed by the tides or the seas it becomes part of the upland, and belongs to the owner of the upland.* And this is but the application of the principle, said to be of natural justice, that *he who loses by the encroachments of the sea should gain by its recession.* Banks *vs.* Ogden, 2 Wall. 57, 67."

APPENDIX "B"

State's Claim of Forfeiture under Section 8, Article XIV, Texas Constitution of 1876

Petitioner's most urgent contention has been that the Padre Island grant, though valid, and explicitly confirmed by the Legislature of Texas in 1852, is nevertheless forfeit to the State by reason of the failure of its owners to have it surveyed, and field notes filed in the General Land Office of Texas, prior to January 1, 1880, in accordance with a provision of Section 8, Article XIV, of the Texas Constitution of 1876. Both the Texas Supreme Court, and the Court of Civil Appeals have been most patient with Petitioner in passing upon and over-ruling this argument. In this suit, an action to try title, this contention was but vaguely before the court: (Petitioner's Application and Brief, pp. 9, 60-75)

(1) *It is the established law of Texas that no forfeiture can be had, nor can the State resume the grant, or otherwise appropriate land once granted, until a forfeiture has been decreed after judicial inquiry under and according to an Act of the Legislature specifically providing for such forfeiture, and for such inquiry, and for divesting the title of the Grantee:*

Section 1, Article XIII, Constitution of Texas, 1876; Hamilton v. *Brown,* 161 U. S. 256; *Jones* v. *McMasters,* 20 How. (U. S.) 8; *Airhart* v. *Massieu,* 98 U. S. 491; *Caplen* v. *Compton,* 5 Tex. Civ. App. 410; *Wiederanders* v. *State,* 64 Tex. 133; *Hanrick* v. *Hanrick,* 54 Tex. 101; *Sabriego* v. *White,* 30 Tex. 576; *Howard* v. *Colquhoun,* 28 Tex. 134; *Luter* v. *Mayfield,* 26 Tex. 325; *Barclay* v. *Cameron,* 25 Tex. 232; *Bowmer* v. *Hicks,* 22 Tex. 155; *Johnston* v. *Smith,* 21 Tex. 722; *Rivers* v. *Foote,* 11 Tex. 662; *Russell* v. *Randolph,* 11 Tex. 460; *Hancock* v. *McKinney,* 7 Tex. 384; *Swift* v. *Herrara,* 9 Tex. 263.

(2) The weakness of Petitioner's position is further illustrated by applying its contentions here to the Tamauli-

pas grant called *Rincon del Oso;* construed by the highest courts of Texas in

> *Schaeffer* v. *Berry,* 62 Tex. 705, 713; and
> *Land* v. *Dunn,* 241 S. W. 580;

on which, as appears from the maps published with the opinion in *Schaeffer* v. *Berry, supra,* and the maps of Nueces County here in evidence, the City of Corpus Christi stands.

Every attack now made, or which has ever been made, upon the Padre Island title (other than such as are implied from non-production of the "final concession," as explained above) applies, equally, to *Rincon del Oso.*

A principal ground of attack on the Padre Island title was that it is a grant of land within ten leagues of the seashore for the making of which previous approbation of the Supreme Mexican executive was not shown. Examination of the Villareal title to *Rincon del Oso,* as published in the cited cases, shows that that objection, if tenable, would apply with equal vigor to that grant.

It was urged against the title to Padre Island, that it was a grant to two individuals of more than five leagues each. *Rincon del Oso* was, on its face, a grant of ten leagues to a single grantee.

It is argued that the Relinquishment Act of 1852, did not take effect as to Padre Island, because of a general exception as to islands. *Rincon del Oso,* though more largely on the mainland, was, also, in part, an island grant.

It is urged, most vigorously, against the Padre Island title, that it was a grant of more leagues than stated, nominally, in the grant. The whole occasion for the plenteous litigation which has affected *Rincon del Oso* (in the cases collated in the opinion in *Land* v. *Dunn*) has been that when its description is applied on the ground, it contains, on any construction of its callings, much more than the ten leagues that its title nominally recites.

Finally, Petitioner argues here, notwithstanding the conclusive efforts of the Texas courts to put it right, that Padre Island is a forfeited title because its owners did not "complete their surveys and the plots thereof," and "return their field notes to the General Land Office," prior to January 1st, 1880, in accordance with a provision of Section 8, Article XIV, of the Constitution of Texas, directing that that be done. The Supreme Court of Texas, in *Schaeffer* v. *Berry, supra,* declared, with reference to *Rincon del Oso,* that

> *"There is no evidence that the owners of the Villareal title have ever complied with the requirements of a survey and return of field notes to the land office, in the confirmation act of August 15, 1870, or with the provisions of the constitution of the state on the same subject."*

It was in proof here that *Rincon del Oso* was one of the grants confirmed by the Act of February 10, 1852 (Confirmation No. 20 for Nueces County). The Attorney General's claim of forfeiture as against Padre Island, applied to *Rincon del Oso,* would render moot the decision of the Supreme Court in *Schaeffer* v. *Berry, supra;* and the opinions of the Texas Courts of Civil Appeals in the many cases decided by them (as listed in the opinion in *Land* v. *Dunn, supra*), involving *Rincon del Oso,* would be in no better case.

And if the Attorney General of Texas believes that Padre Island is a forfeited grant for the reason argued; he must also believe that *Rincon del Oso* is likewise forfeited; and that the vast properties and values which constitute the city of Corpus Christi, together with its homes, factories, wharves and docks, and massive buildings, as well as its immensely valuable adjacent oil fields, all located on *Rincon del Oso,* belong of right, under the Constitution of Texas, to the Public Free School Fund of Texas; and that it is his sworn duty, under the Texas Constitution, to sue for them as such. And he is also in the extraordinary position of having been, for the past five years, suing for barren Padre Island, while the valuable *Rincon del Oso* oil fields, equally the State's property, have been drained of oil, and robbed of their mineral value, without his intervention in behalf of the State.

The same laws and the same constitution which measure Respondents' title to Padre Island, apply, equally, to *Rincon del Oso;* and that great injustice would be done to thousands of citizens by suing to recover *Rincon del Oso,* does not alter the Constitution, or repeal the law.

There is, of course, no ground for forfeiting *Rincon del Oso;* but that is true of the Padre Island title as well; and the Attorney General's argument for forfeiting Padre Island belongs with those dismissed by Mr. Justice Bradley in *Gonzales* v. *Ross,* 120 U. S. 605; as "too frivolous to deserve serious attention."